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## SUPREME COURT OF THE UNITED STATES.

## No. 228.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

VS.

FRANCISCA SCHAEFER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF OHIO.

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**FILED NOVEMBER 4, 1876.**

April 16 1877
Affirmed
Jos P Bradley

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1 At a stated term of the circuit court of the United States, within and for the sixth judicial court and southern district of Ohio, begun and held at the court-house, in the city of Cincinnati, on the seventh day of April, being the first Tuesday of that month, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth—present the honorable Philip B. Swing, judge of said court, among the proceeedings had were the following, to wit:

Francisca Schaefer
*vs.*
Connecticut Mutual Life-Insurance Company. } 1552.

Be it remembered that heretofore, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and seventy-two, came the defendant, by Hoadley & Johnson, its attorneys, and filed in the clerk's office of the court aforesaid a certified transcript of the record and proceedings had in the above-entitled cause in the superior court of the city of Cincinnati, from which said court said cause had been removed.

And afterwards, to wit, on the twenty-sixth day of March, in the year last aforesaid, an entry was made on the journal of our said circuit court in the words and figures following, to wit:

*Entry.*

Francisca Shaefer
*vs.*
Connecticut Mutual Life-Insurance Company. } Assumpsit.

2 On motion to the court, it is ordered that the default in the above case be, and the same is hereby, set aside, and the plaintiff has leave to file her declaration in ten days.

And afterwards, to wit, on the fifth day of April, in the year last aforesaid, came the plaintiff, Franziska Shaefer, by her attorneys, and, by leave of court, filed in the clerk's office of the court aforesaid her certain declaration in the words and figures following, to wit:

*Declaration.*

The United States of America,
*Southern District of Ohio, to wit:*

In the circuit court of the United States for the sixth circuit and district aforesaid, the fifth day of April, in the year eighteen hundred and seventy-two.

Franziska Schaefer, who is a citizen of the State of Ohio, complains of the Connecticut Mutual Life-Insurance Company, defendant, a corporation created by and existing in force of the laws of the State of Connecticut, corporators whereof are citizens of the State last named, of a plea of trespass on the case upon promises.

For that whereas heretofore, to wit, on the twenty-fifth day of July, in the year eighteen hundred and sixty-eight, at the city of Hartford, to wit, in the southern district of Ohio, the defendant made and delivered to George F. Schaefer, then in life, and to the plaintiff, Franzisca Schaefer, its certain policy of insurance, partly printed and partly written, and thereby then and there, in consideration of the declarations and representations made to it, the defendant, on the application for such insurance, and of the sum of one hundred and eight dollars and six cents to it in hand paid by the said George F. Schaefer and the 3 plaintiff, and of the annual premium of one hundred and eight dollars and six cents, to be paid on or before the twenty-fifth day of July in every year during the continuance of said policy, did assure the joint life of them, the said George F. Schaefer and the plaintift, Franciska Schaefer, of Cincinnati, in the county of Hamilton, State of Ohio, in the amount of two thousand dollars, for the term of the whole continuance of their joint life. And the defendant, by the said policy, did promise and agree, to and with the said assured, their executors, administrators, and assigns, well and truly to pay, or caused to be paid, at the city of Hartford, to wit, in the district aforesaid, the amount so insured, that is to say, two thousand dollars, to the survivor of the said assured, his or her executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said George F. Schaefer or of the plaintiff, Franziska Schaefer, whichever should first occur, deducting therefrom all notes taken for premiums unpaid at that date: Provided always, and it was thereby declared to be the true intent and meaning of the said policy and the same was accepted by the assured upon those express conditions, that in case the said George F. Schaefer or the plaintiff should die upon the seas, or should, without the consent of the said company defendant previously obtained and endorsed upon the said policy, pass, either by sea or land, beyond the settled limits of the United States, (excepting by land, or on lakes and rivers, into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude between the first of June and the first of November, or should, without such previous consent thus endorsed, visit California or Oregon, or pass into the territories of the United States lying west of the twenty-fifth meridian of longitude from Washington, or should, without such previous consent thus endorsed, enter into any military or 4 naval service whatever, (the militia not in actual service excepted,) or should, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as a fireman or br*eak*man upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in case he or she should become so far intemperate as to impair his or her health, or induce delirium tremens, or should die by his or her hand or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States or the United States, or of any government where he or she might be, the said policy should be void, null, and of no effect. And it was also understood and agreed to be the true intent and meaning of the said policy that if the proposals, answers, and declarations made by the said George F. Schaefer and the plaintiff, bearing date the twentieth day of July, in the year eighteen hundred and sixty-eight, and which were thereby made part and parcel of the said policy as fully as if therein recited, and upon the faith of which the said agreement

was made, should be found in any respect untrue, then, and in such case, the said policy should be null and void; or in case the said assured should not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the defendant should not be liable to the payment of the sum insured, or any part thereof, and the said policy should cease and determine. And it was further understood and agreed that the said policy should not take effect and become binding on the said company defendant until the premium above named should be actually paid to the said
company, or to some person authorized by it to receive such pre-
5 mium. And it was further agreed that in every case where the
said policy should cease, or become or be null or void, all previous payments made thereon and all dividend-credits accruing therefrom should be forfeited to the defendant. Which policy was, on the day and year first aforesaid, to wit, the twenty-fifth day of July, in the year eighteen hundred and sixty-eight, signed at the city of Hartford, to wit, in the district aforesaid, by Z. Preston, then and there vice-president of the said company defendant, and by U. S. Olmstead, then and there secretary of the said company, and was afterward, to wit, on the thirty-first day of July, in the year aforesaid, countersigned at Cincinnati, Ohio, to wit, in the district aforesaid, by Crosby W. Ellis, then and there general agent of the said company defendant, and was then and there stamped with an internal-revenue stamp of the United States of the denomination and value of fifty cents, and the said stamp was then and there cancelled, as by due requirement of the act of Congress in that behalf provided. All which by the said policy, reference being thereunto had, will at large appear.

And thereupon afterward, to wit, on the day and year last aforesaid, at the district aforesaid, in consideration that the said George F. Schaefer, and the plaintiff, Franziska Schaefer, at the special instance and request of the defendant, The Connecticut Mutual Life-Insurance Company, had then and there paid to the said company, defendant, one hundred and eight dollars and six cents as a premium and reward for the insurance of the said sum of two thousand dollars upon the premises mentioned in the said policy, and had then and there promised the defendant to perform and fulfil all things in the said policy contained on the part of the assured to be performed and fulfilled,
6 the said defendant, The Connecticut Mutual Life-Insurance Com-
pany, then and there promised the said George F. Schaefer and the plaintiff, Franziska Schaefer, that it, the said defendant, would become and be the assurer to the survivor of the said George F. Schaefer, and the plaintiff, Franziska Schaefer, of the said sum of two thousand dollars upon the premises aforesaid, and would perform and fulfil all things in the said policy of insurance contained on its part, as such assurer, to be performed and fulfilled.

And the plaintiff, in fact, says that the proposals, answers, and declaration made by the said George F. Schaefer, and herself, Franziska Schaefer, bearing date the twentieth day of July, in the year eighteen hundred and sixty-eight, mentioned in the said policy, and by reference made part and parcel thereof, were, in all respects, true, to wit, at the district aforesaid.

And the plaintiff, in fact, further says that from the time of the making of said policy of insurance, and of the said promise of the defendant, until the time of the death of the said George F. Schaefer as hereinafter mentioned, the said George F. Schaefer and she, the plaintiff, did pay to the defendant, on or before the twenty-fifth day of July, in every year, the annual premium on one hundred and eight dollars and six cents in the said policy mentioned and required; during all which space of time, as also at the time of the making of the said policy, and of the said promise of the defendant, she, the plaintiff, was interested in the life of the said George F. Schaefer jointly with her own life, to a large amount, to wit, the amount of all the monies ever by him and her jointly insured, or caused to be insured thereon, to wit, at the district aforesaid.

And the plaintiff, in fact, further says that, after the making of the said policy of insurance, and of the said promise of the defendant,
7 to wit, on the fifteenth day of February, in the year eighteen hundred and seventy-one, at the district aforesaid, the said George F. Schaefer died; that he did not die upon the seas, nor by his own hand, nor in a duel, nor in consequence of a duel, nor by the hands of justice, nor in the known violation of any law of any State or of the United States, or of any government whatsoever. And the plaintiff, in fact, further says that neither the said George F. Schaefer nor she did at any time after the making of the said policy of insurance, and of the said promise of the defendant, pass either by sea or land beyond the settled limits of the United States, nor visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, nor visit California or Oregon, nor pass into the Territories of the United States lying west of the twenty-fifth meridian of longitude from Washington, nor enter into any military or naval service whatever, nor was either of them personally employed as an engineer, or fireman, or brakeman on a railroad, nor as an officer, hand, or servant of any steam-vessel, nor in the manufacture or transportation of gunpowder, nor did either become so far intemperate as to impair his or her health, or induce delirium tremens.

And the plaintiff avers that afterward, to wit, on the second day of March, in the year eighteen hundred and seventy-one, the death of the said George F. Schaefer was duly notified to the defendant, The Connecticut Mutual Life-Insurance Company, and satisfactory proof of his death as aforesaid was produced to the said defendant by the plaintiff, to wit, at the district aforesaid; yet although the said George F. Schaefer, during his life-time, did perform and fulfil, and the plaintiff always hitherto, from the time of the making of said policy of insurance, hath performed and fulfilled all things contained in the said policy on the part of the assured and of the survivor of them to be performed and
8 fulfilled; and although ninety days after the death of the said George F. Schaefer was duly notified to the defendant, and after satisfactory proof was so produced of his death as aforesaid, have long since elapsed, and although the defendant was afterward, to wit, on the seventh day of June, in the year eighteen hundred and seventy-one, at the city of Hartford, to wit, at the district aforesaid, requested by the plaintiff to pay her the said sum of two thousand dollars so by it insured, nevertheless the defendant, not regarding its promise, did not nor would, when so requested, nor at any time before or since, at the city of Hartford or elsewhere, pay the said sum, or any part thereof, but has wholly neglected and refused so to do, and still so neglects and refuses, to wit, at the district aforesaid. And also for that whereas heretofore, to wit, on the seventh day of June, in the year eighteen hundred and seventy-one, at the district aforesaid, the defendant was indebted to the plaintiff two thousand dollars for money then and there had and received by it, the defendant, to the use of the plaintiff, and two thousand dollars for

so much money found to be due from the defendant to the plaintiff upon an account then and there stated between them, and being so indebted on consideration thereof then and there promised the plaintiff to pay her the said sums of money when thereunto afterward requested, yet the defendant, although often thereunto since requested, has not paid the said sums, nor either of them, nor any part of the same. Wherefore the plaintiff says that she hath sustained damage of five thousand dollars, and thereupon brings her suit.

PUGH & STRICKLAND,
*Attys. for Plff.*

9 And afterwards, to wit, on the twenty-first day of June, in the year last aforesaid, an entry was made on the journal of said court in the words and figures following, to wit:

*Entry.*

FRANCISCA SCHAEFER
*vs.*
CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.

On motion to the court it is ordered that the default in the above case be and the same is hereby set aside, and said defendant has leave to plead in its said case within thirty days.

And afterwards, to wit, on the twelfth day of July, in the year last aforesaid, came the said defendant, by its attorneys, and filed in the clerk's office aforesaid its certain plea, in the words and figures following, to wit:

*Plea.*

Circuit court of the United States, S. D. O.

FRANCISCA SHAEFER
*vs.*
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.

And the said Connecticut Mutual Life-Insurance Company comes and defends, &c., and says it did not assume and promise in manner and form as the said Francisca Schaefer hath declared against it; and of this it puts itself upon the country, and the plaintiff doth the like.

HOADLEY & JOHNSON,
*Attorneys for the Defendant.*

And afterwards, to wit, on the eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-four, an entry was made on the journal of said court in the words and figures following, to wit:

10 *Entry.*

FRANCISCA SCHAEFER
*vs.* Money.
CONNECTICUT LIFE-INSURANCE COMPANY.

On motion it is ordered by the court that Ernst W. Tillner, plaintiff's husband, be, and he is hereby, made a party plaintiff herein.

And afterwards, to wit, but on the same day and year last aforesaid, an entry was made on the journal of said court in the words and figures following, to wit:

*Jury sworn.*

Francisca Schaefer
*vs.*
Connecticut Mutual Life-Insurance Company. } Money.

This day came the parties, by their attorneys, and thereupon came a jury, to wit, J. M. Clark, W. C. Williamson, George H. Putenney, N. C. Mocabee, Jacob Umstock, James H. Anderson, T. W. Sprague, Robert B. Innes, Morgan Barrere, David L. Jenkins, R. M. Potter, and Wm. Wiswell, who were duly empanelled and sworn well and truly to try the issue joined between the parties; and the evidence not being furnished, the court adjourned the jury until Monday morning next at nine o'clock, to which time this case is continued.

And afterwards, to wit, the trial of the cause progressed from day to day until the fifteenth day of April, in the year last aforesaid, when the following entry was made on the journal of said court in the words and figures following, to wit:

*Entry.*

Francisca Schaefer
*vs.*
The Connecticut Mutual Life-Insurance Company. } Money.

This day again came the parties, by their attorneys, and also the jurors heretofore empanelled and sworn herein, who, having heard the evidence, the arguments of counsel, and the charge of the court, find the issue in favor of the plaintiff, and assess the damages of said
11 plaintiffs, by reason of the premises, at two thousand one hundred and fifty-seven $\frac{20}{100}$ dollars. Whereupon the defendant, by its attorney, gave notice of a motion for a new trial.

And afterwards, to wit, on the twenty-seventh day of June, in the year last aforesaid, an entry was made on the journal of said court in the words and figures following, to wit:

*Entry.*

Connecticut Mutual Life-Insurance Company
*vs.*
Francisca Schaefer. } Money.

This day this case came on for hearing upon the motion of defendant for a new trial, and was argued by counsel and submitted; on consideration whereof the court overrules said motion. It is by the court, therefore, considered and adjudged that the said plaintiff recover of the said Connecticut Mutual Life-Insurance Company, defendant, the said sum of two thousand one hundred and fifty-seven dollars and twenty cents, her damages aforesaid, in form aforesaid assessed, and also her costs in this behalf expended, taxed at $ ; and execution is awarded therefor. To which finding and judgment the said defendant, by its attorneys, excepts, and presents to the court its bill of exceptions, and prays that the same be allowed, signed, sealed, and made part of the record in this case. All which is done accordingly.

12 Circuit court of the U. S., southern district of Ohio.

FRANCISCA SCHAEFFER
*vs.*
THE CONNECTICUT MUTUAL LIFE-INSURANCE Company.
} Bill of exceptions.

Be it remembered that this cause coming on to be tried at the April term, A. D. 1874, before the honorable P. B. Swing, district judge, sitting as circuit judge, and a jury, the plaintiff, to maintain the issue on her part, offered in evidence the policy of insurance hereto attached and made part thereof, marked "Exhibit A;" and further to maintain the issue upon her part, plaintiff called as a witness Charles Hall, whose evidence tended to prove that he knew George F. Schaeffer in his lifetime; said Schaeffer was dead; that he saw his dead body in February, 1871. Also tending to prove said Schaeffer was not an intemperate man. Plaintiff, to further maintain the issue on her part, offered in evidence proofs of death of George F. Schaeffer, hereto attached and made part hereof, marked "Exhibit B;" the renewal receipt, hereto attached and made part hereof, and marked "Exhibit C;" and renewal receipt, hereto attached and made part hereof, and marked "Exhibit D." And thereupon plaintiff having rested her case, defendant offered in evidence the original application of plaintiff and her husband to defendant for insurance to the defendant, and the medical examination of Dr. C. F. Bruckner accompanying the same, all of which is hereto attached, and marked "Exhibit E." Also, three forbearance notes given to said
13 defendant as part payment of premium of policy upon which this action is founded, which are hereto attached and made part hereof, marked "Exhibits F, G, & H."

And defendants, further to maintain the issue on its part, calls as a witness Charles F. Buckner, by whom it offered evidence tending to prove that he was a regularly-educated physician & graduate of a German university, and had been in practice for twenty years; that he had attended in his professional capacity in 1869 on the deceased, George F. Schaeffer, and had treated him for an attack of delirium tremens, from which disease he was then suffering, and which was caused from the excessive use of intoxicating liquors. That said George F. Schaeffer had become so far intemperate as to impair his health; that the excessive use of intoxicating spirits would impair health.

Defendant, to further maintain the issue on its part, called as witness John Cohoers, John Heckle, John D. Birnbaum, George Ochsner, by whom and each of them defendant offered testimony tending to show that said George F. Schaeffer had become so far intemperate as to impair his health, and that he came to his death by his own hands. And therefore the defendant, to further maintain the issue on its part, proved that said plaintiff had been divorced from George F. Schaffer after the issuing of the policy herein; that alimony had been awarded to her out of his estate, which had been collected in full by said plaintiff prior to the decease of said Schaffer; that there never was issue of said marriage; that said George F. Schaeffer had married again, and that said plaintiff had married again prior to this trial and subsequent to said divorce, and was now living with her said husband.

And the defendant, to further maintain the issue on its part, 14 offered evidence tending to prove that the forbearance note marked "Exhibit H" had been given after the decree of divorce of said parties, and that the signature thereto was not the signature of George F. Schaeffer.

And thereupon the defendants having rested, the plaintiff, to maintain the issue on her part, offered evidence tending to prove that the said George F. Schaeffer, at the time of his death, was of unsound mind, and that he had not impaired his health by intemperate habits.

And plaintiff, further to maintain the issue upon her part, was sworn as a witness in her own behalf, and upon cross-examination said plaintiff admitted that she had employed one George H. Harris as her attorney to file a petition of divorce against George F. Schaeffer in the court of common pleas in Hamilton County. But said plaintiff denied that she had stated to said George H. Harris, to be embodied in her petition for divorce, that Schaeffer had been an habitual drunkard for a period of more than three years prior to the date of her filing her petition, which said petition plaintiff admitted was filed July 1st, 1869.

Plaintiff, further to maintain the issue on her part, offered evidence tending to prove that the signature to the forbearance note attached hereto and marked "Exhibit H" was attached thereto by her son, the issue of a former marriage other than with Schaeffer, and he had her authority so to sign said note.

And plaintiff, further to maintain the issue on her part, offered testimony tending to prove that George F. Schaeffer, at the time of making application to defendant for insurance, was a man of temperate habits, and had always been prior thereto.

And plaintiff, further to maintain the issue on her part, testified that she went into the room of George F. Schaeffer in December, 1869, 15 while Dr. Bruckner was attending him, and that said George F. Schaeffer spoke properly while she was there.

And defendant, to rebut the testimony of plaintiff, and to further maintain the issue on its part, proved that the decree of divorce was made and entered on the 6th day of January, 1870; and further offered evidence tending to show that it had no actual knowledge whatsoever of said divorce, or the pendency thereof, until after the decease of George F. Schaeffer.

And thereupon the defendant, to further maintain the issue upon its part, called George H. Harris, who, being sworn, stated that he had acted as attorney for plaintiff in her suit for divorce from George F. Shaeffer.

And thereupon defendant's attorney asked the following question: State whether or not the plaintiff did not tell you when you were preparing her petition for divorce George F. Shaeffer had not been an habitual drunkard for more than three years prior to that date, to which question plaintiff's attorney objected, upon the ground that said Harris received said communication, if any were made, in his professional capacity, and that the same was not competent evidence, which objection the court sustained and ruled out the said question, to the sustaining of which said objection and the ruling out of said question the defendant then and there excepted.

And defendant further offered testimony to prove that George F.

Shaeffer, at the time of making application to defendant for insurance, was not then and had not always been a man of temperate habits.

And the testimony having been closed, and the cause having been argued by both sides the court and jury, counsel for defendant asked the court in writing to charge the jury, among other things, as follows:

First. If you find from the evidence that at the time of the death of 1
George F. Shaeffer plaintiff had ceased to have any insurable in-
16 terest in his life, then she cannot recover in this case except the
amount of premiums paid by her to defendant on the policy issued
herein from the time of the taking out of the same up to the date of plaintiff ceasing, as aforesaid, to have an insurable interest in the life of said deceased.

Second. If you find from the evidence that plaintiff has no insurable interest in the life of said George F. Shaeffer at the time of his decease, then there can be no recovery in this case. 2

Third. If you find from the evidence that plaintiff was, before the decease of said George F. Shaeffer, divorced from him, awarded alimony by decree of court out of the estate of her said husband, which she had collected, and had married again before the trial of this cause, then I charge you that she cannot recover in this case. 3

Fourth. Wagering-policies of life insurance are void in law, and if plaintiff was divorced from said Shaeffer and awarded and collected alimony out of his estate prior to his decease, then I charge you that her insurable interests in his life ceased, and, as far as she was concerned, said policy thereafter became and was a wagering-policy, and no recovery can be had by her thereon. 4

Fifth. If you find from the evidence that plaintiff was, before the decease of said George F. Shaeffer, divorced from him, awarded alimony ou' of his estate, which she had collected prior to the trial of this cause, and had married again to another, then she cannot recover in this case upon the ground that she had the insurable interest which a wife has in the life of her husband. 5

Sixth. If you find that the premium-note given for renewal July, 1870, was not signed by plaintiff and deceased George F. Shaeffer or by some 6
one authorized by them, jointly, so to do, then there can be no re-
17 covery in this case; the authority of one so to sign said note is
not binding on the other, and when defendant shows by the evi-
dence that said note was not signed by either of said parties, the burden of proof is then upon plaintiff to show that it was signed by some one authorized by them jointly so to sign the same in their joint name.

All and each of which said charges numbered as above from one to six inclusive, the court refused to give; to the refusal to give any, each, and all of said charges defendant then and there excepted. And the defendant then and there asked that certain other charges set out herein, and numbered five to fifteen inclusive, be given to the jury, which application the court granted and gave said charges. Whereupon the court charged the jury, among other things, as follows:

First. If the jury find from the evidence that at the time of and prior to the making of the application for the policy the said George F. Schaeffer was of intemperate habits, which fact was known to the plaintiff, and was material to the making of the contract, and was concealed from the defendant, this would avoid the policy and the plaintiff could not recover. 1

Second. The terms of the policy do not stipulate against the divorce of the parties, and if its effect be as claimed by the defendant it must be the legal result of the decree. This defence is based upon the proposition that to entitle the plaintiff to a recovery there must have existed in her 2

an insurable interest at the time of the death of George F. Schaeffer. If this proposition be not true, it is unnecessary for us to enquire whether, in this particular case, the decree of divorce had the effect claimed by the defendant. In England it seems now to be the settled law
18 that it is not necessary that the insurable interest should exist at
the time of the death. And such has been the doctrine held by some of the courts in the United States, (here the court quoted from a number of authorities,) and such I charge to be the law in this case.

Third. If there could have been a doubt as to the insurable interest of a wife in the life of her husband, such doubt can no longer exist, as
3 it is now expressly vested by the statute of Ohio; such an insurable interest existing in the plaintiff in the life of George F. Schaeffer, at the issuing of the policy, it was not necessary that such interest should have existed at the time of his death. If, therefore, the decree of divorce did have the effect to extinguish all insurable interests in the plaintiff, it will not prevent her recovery in this case.

Fourth. In regard to the premium-note of July, 1870, purporting to
4 be signed by George F. and Francisca Schaeffer, if the same was signed by any one authorized by the plaintiff alone so to do, said authorization was sufficient without said authority being also given by said George F. Schaeffer.

Fifth. If you find from the evidence that the deceased was of intemperate habits at the time of the procurement of the policy sued on, and that the statement contained in the application that he was of temperate habits was untrue, then defendant is entitled to a verdict.

Sixth. If you find from the evidence that after the issuing of policy sued on, deceased, George F. Schaeffer, became of intemperate habits, such habits of intemperance did impair his health, then there can be no recovery in the case.

Seventh. If you find from the evidence that deceased, George F. Schaeffer, became insane by reason of intemperate habits, and
19 whilst in such state of insanity so caused by said intemperate
habits he committed suicide, there can be no recovery in this case.

Eighth. If you find from the evidence that deceased, George F. Schaeffer, died by his own hand, or, in other words, committed suicide, there can be no recovery in this case unless it be shown that at the time he so committed the act of suicide he was insane.

Ninth. The mere fact that deceased, George F. Schaeffer, took his life is not in itself conclusive upon the question of his insanity, and if you believe that when he so committed suicide he was capable of distinguishing right from wrong and knew the consequence of the act that he was about to commit, even though you believe that his mind might have been somewhat impaired, there can be no recovery under the policy in this case.

Tenth. If deceased, George F. Schaeffer, at the time of committing suicide was in possession of enough mind to distinguish right from wrong, and knew the consequences of the act he was then about to commit, but was impelled thereto by jealousy, disappointment, or desire to rid himself, of worldly troubles, there can be no recovery in this case.

Eleventh. If you believe, from the evidence, said George F. Schaeffer, in a mere fit of drunken desperation took his own life, there can be no recovery in this case.

Twelfth. If you find from the evidence that deceased, George F. Schaeffer, became so far intemperate before his death as to impair his health, then there can be no recovery in this case.

20 Thirteenth. If you find from the evidence that said George F.

Schaeffer after the issuing of the policy in this case had the delirium tremens, then there can be no recovery in his case, irrespective of how slight the attack may have been.

Fourteenth. I charge you that by the contract made between these parties, the application for insurance and the answer to the question therein contained are parts of said contract, and if any material questions or statements are falsely answered, or if there has been any concealment, with'olding, or misrepresentation of any material circumstance which might render an insurance on the life proposed more than usually hazardous, or with which the directors ought to be made acquainted, then said policy is void, and there can be no recovery thereon.

Fifteenth. If you find from the evidence that prior to the application for insurance in this case Geo. F. Schaeffer was in the habit of using intoxicating liquors to such an extent that the use thereof, whilst he was under its influence, affected his mind, and that the same was known to the parties, or either of them, at the date of making said application, and that said information was withheld from the defendant, whether intentionally or otherwise, and that knowledge of such fact was a material circumstance which might render an insurance on the life of said George F. Schaeffer more than usually hazardous, or with which the directors of defendant ought to be made acquainted, then
and in that case plaintiff cannot recover in this case. To the giv-
21 ing of said charges and each of them, numbered as above, from
one to four inclusive, the defendant then and there excepted.
And the said court, having concluded the charge to the jury, and the jury being about to retire for consultation as to their verdict, the defendant demanded that so many of the special charges prayed for by it which had been given by the court, and all of which were in writing, should be given to the jury for use by said jury in its consultation as to its verdict, which said demand was overruled by the court, and said court refused to permit said charges as aforesaid to be taken by the said jury; to the overruling of said demand, and the refusal so as aforesaid to permit said jury to take said charges as aforesaid to be used by said jury in its consultation, defendant then and there excepted. Whereupon defendants tendered this their bill of exceptions, and prayed that the same might be signed, sealed, allowed, and made part of the record, which is done accordingly.

P. B. SWING, [SEAL.]
*District Judge U. States Southern District of Ohio,*
*sitting in the Circuit Court for said District.*

22 EXHIBIT A. 8 Ju-91

## CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

No. 86708. This policy of insurance witnesseth, that the Connecticut Mutual Life-Insurance Company, in consideration of the declarations and representations made to them in the application for this insurance and the sum of one hundred and eight dollars and six cents to them in hand paid by George F. and Franziska Schaefer, of Cincinnati, O., and of the
Annual premium $108.06. annual premium of one hundred and eight dollars and six cents, to be paid on or before the twenty-fifth day of July in every year during the continuance of this policy, do assure the joint lives of George F. and Franziska Schaefer, of Cincinnati, in the county

of Hamilton, State of Ohio, in the amount of two thousand dollars, for the term of the whole continuance of their joint lives.

Term of joint lives.

Sum insured, $2,000.

And the said company do hereby promise and agree, to and with the said assured, their executors, administrators, and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured, to the survivor of said assured, his or her executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said George F. or Franziska Schaefer, whichever shall first occur, deducting therefrom all notes taken for premiums unpaid at that date.

And it is hereby conditioned and agreed, that if at any time after three premiums have been paid on this policy it shall be surrendered while yet in force, the company will issue a paid-up non-forfeiture
23 policy therefor, for such an amount as the then present value of this policy would purchase as a single premium.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said George F. or Franziska Schaefer shall die upon the seas, or shall, without the consent of this company, previously obtained and endorsed upon this policy, pass either by sea or land beyond the settled limits of the United States (excepting by land, or on lakes and rivers, into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or visit those parts of the United States which lie south of the thirty-sixth degree of north latitude, between the first of June and the first of November, or shall, without such previous consent thus endorsed, visit California or Oregon, or pass into the Territories of the United States lying west of the twenty-fifth meridian of longitude from Washington, or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted,) or shall, without such previous consent thus endorsed, be personally employed as an engineer or fireman in charge of a steam-engine, or as a fireman or brakeman upon a railroad, or as an officer, hand, or servant of any steam-vessel, or in the manufacture or transportation of gunpowder, or in case they shall become so far intemperate as to impair their health, or induce delirium tremens, or shall die by their own hand or in a duel, or in consequence thereof, or by the hands of justice, or in the known violation of any law of the States, or the United States, or of any government where
24 he may be, this policy shall be void, null, and of no effect.

Exhibit A.
50c stamp.

And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers, and declaration made by the said George F. and Franziska Schaefer, and bearing date the 20th day of July, 1868, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void; or in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.

And it is further understood and agreed that this policy shall not take effect and become binding on said company until the premium above named shall be actually paid to said company or to some person authorized by them to receive it.

And it is further agreed that in every case where this policy shall cease or become or be null or void, all previous payments made thereon and all dividend-credits accruing therefrom shall be forfeited to the said company.

In witness whereof the said Connecticut Mutual Life-Insurance Company have by their president and secretary signed and delivered this contract in the city of Hartford this twenty-fifth day of July, one thousand eight hundred and sixty-eight; but the same shall not be
25 binding until countersigned by Crosby W. Ellis, gen'l agent at Cincinnati, O.

T. PRESTON, *V. President.*

W. S. OLMSTEAD, *Secretary.*

Countersigned at Cincinnati, O., this 31st day of July, 1868.

CROSBY W. ELLIS, *Gen'l Agent, A. G.*

*Endorsements on back.*

Proofs of death required.

1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.

2nd. A certificate of a disinterested acquaintance of the deceased, certifying to the time and fact of his death, and that he or she was the person insured by that name in this company, and the number of the policy.

3d. A certificate, from the undertaker, sexton, or clergyman who officiated at the funeral of the deceased, and saw the body interred.

4th. A certificate, from some intimate friend of the deceased, of the age of the party at the time of his death.

These several certificates should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.

26 Acceptance of the premium due on this policy by the company or its agents after the day upon which it is due must be consid-
Exhibit A. ered as acts of grace or courtesy, and in no wise to be construed as forming a pre*si*dent for future payments or a waiver of the forfeiture of the policy according to the conditions therein expressed, if any future payment of premium be omitted on the day it falls due.

Agents of the company are in no case authorized to make, alter, or discharge contracts, or waiver forfeitures.

The annual premium required to continue this policy in force must be paid on or before the date of the same, or the insurance ceases and the policy is void. The only evidence of payment of such premium, which will be acknowledged by the company as valid and binding, is a certificate of renewal signed by the secretary of the company. Certificates for this purpose will be furnished (for delivery to policy-holders) to those agents of the company who are authorized to collect premiums on account of the company; but as such authority is liable to frequent changes, and subject to be revoked without the knowledge of the insured, and as persons not so authorized may solicit payment of premium, representing that their receipt or endorsement will renew the policy, the policy-holders are cautioned not to pay renewal premiums to any person except upon delivery of a renewal certificate, issued from the office of the company, and signed by the secretary. This caution is important to policy-holders, to prevent payments being made to irresponsible persons, or those not authorized by the company to receive them, thereby

27 not only losing the money paid, but forfeiting the insurance also.

For the convenience of policy-holders these renewal certificates will be furnished to the agents through whom the policy was issued, or at the location where it was last renewed, to be delivered upon the payment of the premium, unless otherwise directed by the insured; but the possession of the renewal certificate is the only evidence to the policy-holder of the authority of the agent to receive the premium.

No. 86708.]

THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

Assurance on the joint lives George F. and Franziska Schaefer.

| | |
|---|---|
| Amount | $2,000 |
| Date, July 25th, 1868. | |
| Term of joint lives. | |
| Annual premium | $108. 06 |
| Extra do | $ |
| When due, July 25th. | |
| Cash part of payment | $54. 06 |
| Policy & stamps | $2. 50 |
| | $56. 56 |
| Amount of note | $54. |
| | $ |

Local meinthey.

28

### EXHIBIT B.

### THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.

No. 1.—Claimant's certificate.

Claimant's name and residence?—Franziska Schaefer, 640 Vine street, Cincinnati, Ohio.

Number, date, and amount of policy?—No. 86708. Date, July 25th, 1868. $2,000.

In what capacity, or by what title, do you make the claim?—As beneficiary named in joint policy.

Name of deceased in full?—George F. Schaefer.

How long had you known deceased?—Since 19 years.

Residence of deceased since above policy was issued?—Cincinnati, Hamilton County, Ohio.

The several occupations of deceased since the above policy was issued?—Owner of a photograph gallery, wholesale liquor-dealer, & hotel-keeper.

Place and date of birth of deceased?—Born at Hanan by Frankfort in Germany, July 1st, 1821.

Place and date of death?—Died at Cincinnati, Ohio, at the 15th day of February, 1871.

Cause of death, immediate and remote? Give every particular in relation thereto within your knowledge.—He came to his death from suicide by a pistol-shot through the head during a fit of temporary insanity.

Duration of last illness?—Death followed instantly.

Name and residence of every physician who attended or prescribed for deceased during the last year prior to death?—Was not under medical treatment to my knowledge.

Did the deceased violate any condition of the above-mentioned policy, in respect to residence, travel, occupation, use of spirituous liquors, dueling, suicide, violation of law, or had he been convicted of felony?—He was in habit of using spirit'ous liquors, and committed suicide in a state of temporary insanity.

(Signed) FRANZISKA SCHAEFER.

*Oath.*

STATE OF OHIO,
*County of Hamilton, ss:*

On this twenty-third day of February, A. D. 1871, personally appeared before me the above-named Franziska Schaefer, and made oath that the answers by her above made and subscribed are true and full to the best of h knowledge and belief.

[SEAL.] JOSEPH HOLLAENDER,
*Notary Public in & for said County in said State.*

[Stamp, ten c. 1872]

No. 2.—Attending-physician's certificate.

All answers must be in the physician's own handwriting.

How long have you practiced as a physician, and where did you receive your medical education?

Name of deceased?

Place and date of death?

How long had you known deceased?

How long had you been h usual medical adviser?

Since you have known deceased, *a*What have been h several occupations, and *b*H places of residence?—*a.* *b.*

Duration of last illness?

Date of your first visit, or prescription, in last illness?

Date of last visit?

State the cause of death, remote and immediate; if from disease, its history, and the symptoms present during its progress?

If from any cause other than disease, state the medical and other facts connected therewith?

Was a post-mortem examination made, by whom, and with what results?

Had deceased any other disease, acute or chronic, or had h ever had any injury or infirmity?

Was there anything in h habit or mode of life predisposing h to disease?

Did deceased use spirituous liquors—to what extent, and with what effect?

State any other facts within your knowledge, relative to the cause of death?

State the apparent age of deceased.

*Oath.*

STATE OF
*County of* , *ss :*

On this day of , A. D. 187 , personally appeared before me the above-named , a physician in regular standing, and made oath that the answers by him above made and subscribed are true and full, to the best of his knowledge and belief.

[Five-cent stamp.]

29 THE STATE OF OHIO,
*Hamilton County, sct :*

I, H. H. Tinker, clerk of the court of common pleas within and for said county of Hamilton, do hereby certify that Joseph Hollander, whose name is signed to the certificates hereto attached, was at the time of subscribing the same a legally-acting notary-public in and for said county of Hamilton, duly commissioned and qualified; and that I am well acquainted with his handwriting, and believe his said signatures to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Cincinnati, this 27 day of February, A. D. 1871.

[SEAL.] H. H. TINKER,
*Clerk H. C. C. P. O.*
By EMIL HOFFMAN, *Deputy.*

[Stamp, 5c., cancelled.]

30 No. 3.—Friend's certificate. B.

Name of deceased in full ?—George F. Shaefer.

Residence ?—Cincinnati, Hamilton County, Ohio.

Occupation ?—Kept hotel & quitted business entirely on June 10, 1870.

Date and place of death ?—Cincinnati, February 15th, 1871.

Cause of death ?—Committed suicide in a state of temporary insanity.

Was the deceased insured in the Connecticut Mutual Life-Insurance Company ?—Yes.

Number, date, and amount of policy ?—No. 86708 ; date, July 25, 1868 ; $2,000.

Do you know the deceased to be the person insured by the above-named policy by the name above given ?—I do know it.

Have you any interest in the above policy ?—I have none.

JACOB DOERLER.

*Oath.*

STATE OF OHIO,
*County of Hamilton, ss :*

On this twenty-third day of February, A. D. 1871, personally appeared before me the above-named Jacob Doerler, and made oath that the answers by him above made and subscribed are true and full, to the best of his knowledge and belief.

[SEAL.] JOSEPH HOLLAENDER,
*Notary Public in & for said County & State.*

[Five-cent stamp—Stamp cancelled.]
Doerler, Feb. 23, 1871.

No. 4.—Undertaker's certificate.

Name of deceased?—George F. Schaefer.

Residence and occupation?—He resided in Cincinnati as a private person.

Date of birth?—July 1st, 1821.

Date and place of death?—February 15th, 1871, at No. 640 Vine str., Cincinnati, Ohio.

Did you inter the deceased; when and where?—I interred deceased at Walnut Hill Cemetery, February 16, 1871.

Do you know the body interred by you to be that of the person named by you as the deceased?—Yes, I did.

Your name, residence, and post-office address?—Joseph Schreiber, No. 664 & 666 Vine street, Cincinnati, Ohio.

JOS. SCHREIBER.

*Oath.*

STATE OF OHIO,
*County of Hamilton, ss:*

On this twenty-third day of February, A. D. 1871, personally appeared before me the above-named Joseph Schreiber, and made oath that the answers by him above made and subscribed are true and full, to the best of his knowledge and belief.

[SEAL.] JOSEPH HOLLAENDER,
*Notary Public in & for said County & State.*

[Five-cent stamp—Stamp cancelled.]
Jos. Schrieber, Feb. 23, 1871.

*Instructions.*

No. 1, claimant's certificate, is to be executed by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor, or administrator of a deceased beneficiary, or as guardian, or other legal representative of a minor, or as a trustee, or as assignee. In case of assignment, a sworn statement of interest must be made, and a copy of the assignment furnished. Executors, administrators, and guardians must send certified copies of their appointment and certificate of qualification. Trustees, unless named in the policy, must exhibit their authority.

No. 2, attending physician's certificate, is to be executed by the physician attending the deceased in his last illness. If more than one physician were employed, the certificate of each must be obtained. The entire certificate must be in the handwriting of the physician.

No. 3, friend's certificate, is to be executed by some person intimately acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

No. 4, undertaker's certificate, is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the clergyman who officiated at the interment.

Every question must be distinctly and fully answered; and the company reserves the right to ask any further questions necessary under the circumstances of any particular case.

Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority and the genuineness of his signature must be attested by the clerk of a court of record.

If the oath be administered in a foreign country, the official character of the person administering the same, or of the clerk or other officer of a court certifying thereto, must be authenticated by a consul or minister of the United States residing in such foreign country.

All certificates must be duly stamped according to law before forwarding.

(Indorsed:) Death-claim No. . The Connecticut Mutual Life-Insurance Co., of Hartford, Conn. Proofs of the death of who died at on the day of 187 . Submitted to the company for examination and approval. Policy No. . Amount, $ . Received, . Examined, . Payable,

The above blanks are to be filled at the company's office only.

All claims are payable only at the company's office in the city of Hartford, Conn., when due, on presentation of the policies, properly receipted by the owner thereof.

31 Policy No. 86708.] EXHIBIT C.

| | |
|---|---|
| Original ann'l pre'm | $108 06 |
| Cash | $54 06 |
| Interest on 1 notes | 3 24 |
| Extra premium | |
| Cash | $57 30 |
| Forborne | $54 |

Received amount as above this 25th day of July, 1869.
By C. W. Ellis & Co.

[Stamp 2c.]

OFFICE OF CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY,
*Hartford, July 25th*, 1869.

Received (as per margin) premium and dues on policy No. 86708, in full for insuring the life of George F. & Franziska Schaefer to 25 July, 1870, but this receipt shall not be valid or in force until payment is made as indicated in the margin, and this receipt countersigned by C. W. Ellis & Cohn, agent', at Cin., O.

W. S. OLMSTED,
*Secretary.*

No agent has authority in any case to waive or postpone payments of premiums, or to make binding or continue any policy of insurance, except by countersigning the receipts for specified policies issued from the office of the company at Hartford, and signed by the secretary; and by mutual agreement, (see policy;) the delay of payment of the premium beyond the day of date of the policy makes void the insurance and renders the policy invalid.

32 No. 86708.] EXHIBIT D.

| | |
|---|---|
| Annual premium | $108 06 |
| Less new note | 54 |
| Cash premium | $54 06 |
| Interest on 2 notes | 6 48 |
| Extra premium | |
| Total cash payment | $60 54 |

Received amount as above, this daay of , 1870.
By .

[Stamp 2c.]

OFFICE OF CONNECTICUT MUTUAL LIFE-INSURANCE CO.,
*Hartford, July* 25, 1870.

Received (as per margin) annual payment due at above date, on policy No. 86708, for insuring the life of George F. and Franziska Schaefer, for one year, from the date hereof, but this receipt shall not be valid or binding until payment is made, as stated in the margin, and this receipt countersigned by Geo. W. Fackler & Co., agent', at Cincinnati, O.

W. S. OLMSTED, *Sec'y.*

No agent has authority in any case to waive or postpone payments of premiums, or to make binding or continue any policy of insurance, except by countersigning the receipts for specified policies issued from the office of the company at Hartford, and signed by the secretary; and by mutual agreement, (see policy ;) the delay of payment of the premium beyond the day when due makes void the insurance and renders the policy invalid.

33 EXHIBIT E.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, HARTFORD, 1868

Examination of Mrs. Francisca Schaefer the 23d day of July, 1868.

For an intelligent decision as to the insurability, or otherwise, of applicants, the directors depend much upon the certificates of the medical examiners; they therefore expect that their answer to each question will be full, explicit, and so far as possible, exact; and no certificate failing to conform substantially to this requirement will be accepted. Please read circular and write legibly, and with black ink.

1st. Height, figure, weight, temperament, general appearance, and habits of life?—Height, 5'4"; fig., stout; weight, 166 lbs.; tem., phlegmatic; gen. app., healthy; habits of life, temperate.

2nd. Whether any residence in southern, tropical, or other foreign climates; and, if so, what effect, if any, was produced on the constitution and health? Note.—If applicant has been in the Army; state its effects on his habits; also, his occupation before and since his connection with the Army?—No.

3rd. Any affection, functional or orgaic, of the head, or of any part of the nervous system? Has there been any apparent predisposition to disease of brain or spinal cord, as indicated by conformation, family history, occupation, or habits?—A. No. 34

4th. Is respiration full, easy, gentle, and regular? 2. How many inspirations per minute? 3. Is the inspiratory murmur full and healthy, and to be heard alike over both lungs? State any departure from a healthy condition, if it exists.—1. Yes; 2. 16 the minute; 3. Yes.

5. Is the party subject to cough, catarrh, a vitiated expectoration, or difficulty of breathing? If so, what is its cause?—No.

6. 1. Rate, strength, and volume of the pulse? 2. Is the heart's action uniform, free, and unobstructed? 3. Are its sounds and impulses healthy? If not, describe (particularly) any departure from a normal condition.—1st. 70 the minute, full and regular; 2. Yes; 3. Yes.

7. Are either the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs now diseased, or have they been?

Note. If applicant be a female, state present condition of uterine functions; and, if married, the number and character of her 35 labors?—No. She had one labor, regular and without any effect to her health.

8. Has the party ever suffered from serious mechanical injury; if so, when, and what is his present condition? From severe or acute constitutional disease? If so, what?—No.

9. State the ages and health of parents, if living; if dead, their ages and the diseases of which they died.—A. Father died fifty years of age, of typhus. Mother living, 75 years of age.

10. Any predisposition, either hereditary or acquired, to constitutional disease? If so, state particularly what.—No.

11. Do you consider the party's life safely insurable? Do you advise that a policy be issued?—Yes; and I advise that a policy be issued.

(Signed) CHARLES F. BRUCKNER, M. D.,
*Examining Physician.*

Where graduated, Wurzburg; when graduated, 1852.

36 CONNECTICUT-MUTUAL LIFE-INSURANCE COMPANY, HARTFORD, 1868.

Examination of Mr. George Frederick Schaefer, 23d day of July, 1868:

For an intelligent decision as to the insurability, or otherwise, of applicants, the directors depend much upon the certificates of the medical examiners; they therefore expect that their answer to each question will be full, explicit, and so far as possible, exact; and no certificate failing to conform substantially to this requirement will be accepted. Please read circular, and write legibly, and with black ink.

1st. Height, figure, weight, temperament, general appearance, and habits of life?—Height, 5′ 8″; fig., tall; weight, 155 lbs.; tem., choleric; gen. app., healthy; habits of life, temperate.

2nd. Whether any residence in southern, tropical, or other foreign climates; and, if so, what effect, if any, was produced on the constitution and health? Note.—If applicant has been in the Army, state its effects on his habits; also his occupation before and since his connection with the Army.—No.

3d. Any affection, functional or organic, of the head, or of any part of
the nervous system? Has there been any apparent predisposi-
37 tion to disease of brain or spinal cord, as indicated by conforma-
tion, family history, occupation, or habits?—No.

4. Is respiration full, easy, gentle, and regular? 2. How many inspirations per minute? 3. Is the inpiratory murmur full and healthy, and to be heard alike over both lungs? State any departure from a healthy condition, if it exists.—1. Yes; 2. 18 the minute; 3. Yes.

5. Is the party subject cough, catarrh, a vitiated expectoration, or difficulty of breathing? If so, what is its cause?—No.

6. 1. Rate, strength, and volume of the pulse? 2. Is the heart's action uniform, free, and unobstructed? 3. Are its sounds and impulses healthy? If not, describe (particularly) any departure from a normal condition?—1st. 72 the minute, full and regular; 2. Yes; 3. Yes.

7. Are either the stomach, liver, spleen, kidneys, intestinal canal, or
urinary organs now diseased, or have they been? *Note.*—If ap-
38 plicant is a female, state present condition of uterine functions;
and, if married, the number and character of her labors.—No.

8. Has the party ever suffered from serious mechanical injury? If so, when, and what is his present condition? From severe or acute constitutional disease? If so, what?—No.

9. State the ages and health of parents, if living; if dead, their ages, and the diseases of which they died.—Father living, 68 years of age. Mother died 56 years of age, of liver complaint.

10. Any predisposition, either hereditary or acquired, to constitutional disease? If so, state particularly what.—No.

11. Do you consider the party's life safely insurable? Do you advise that a policy be issued?—Yes; and I advise that a policy be issued.

(Signed) CHARLES F. BRUCKNER, M. D.,
*Examining Physician.*

Where graduated, Wurzburg; when graduated, 1852.

39 THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY, OF HARTFORD, CONN.

* *Declaration.*

I, Franziska Schaefer, of Cincinnati, county of Ham., State of Ohio, being desirous of effecting an assurance with The Connecticut Mutual Life-Insurance Co., in the sum of two thousands dollars, upon the †life of Geo. F. Schaefer, of Cinc'ti, county of Ham., and State of Ohio, during the whole ‡term of his life, do hereby declare that his age next birthday will be forty-eight years; that he is now in good health, of sober and temperate habits, and do usually enjoy good health; and that the following answers and statements are correct and true, in which I have not concealed, withheld, or misrepresented any material circumstance in relation to the past or present state of his health, habits of life, or condition, which may render an assurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted. And I do hereby declare that I have an interest in the life of the said G. F. Schaefer to the full amount of the said sum of two thousand dollars.

And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between him and the said company; and that if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits which may accrue therefrom, shall be forfeited to said company; and I further agree, that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of the premium, as stated therein, shall be paid to said company in the life-time of said assured.

Dated at Cincinnati this 20 day of July, 1868.

(‖Signed) FRANZISKA SCHAEFER.
G. F. SCHAEFER.

Witness;
C. MANTHEY.

---

* This declaration should be made and signed by the person in whose name and benefit the policy is desired. If a wife insures a husband, it should be made in her name, and both should sign it and the answers to the questions below.

† Insert "my own," if assurance is proposed on the party's own life; if on another's life, nsert the person's name.

‡ "Whole term of life," or "term of three, five, or seven, &c. years."

‖ In signing, write the Christian name.

QUESTIONS AND ANSWERS ABOVE REFERRED TO.

1. Name and residence of the person for whose benefit the assurance is proposed. ¶ ☞Give Christian names in full and plainly written. If wife or husband, so state. Fraziska Schaefer, Cin'ti, O.

2. Name and residence of the person whose life is proposed to be insured. ☞See note as above. If wife or husband, father, mother, brother, or sister of applicant, so state. Geo. Frederick Schaefer, her husband.

3. Occupation of person whose life is to be insured; and whether married or single. Photograph; married.

4. Place and date of birth of the party whose life is to be insured, giving months and days. Hanau, Hesse-Cassel, 1 June, 1821.

5. Age next birthday. Forty-eight years.

6. Is the party now, and has he always been, of temperate habits? Yes.

7. Has the party resided out of the United States; and, if so, where, for what purpose and period, and what was the effect of such residence on his health? Emigrated to the United States.

8. Has the party been vaccinated or had the small-pox? Yes; had no small-pox.

§9. Grandparents living, ages, health, ; grandparents dead, ages, cause of death ; parents living, father, ages, 68, health good; parents dead, mother, ages, 56, cause of death, unknown; brothers living, 1, ages, 35, health, do; brothers dead, 11, ages, cause of death, infancy; sisters living 1, ages 47, health, do; sisters dead, ages, cause of death, .

10. Has grandparent, parent, brother or sister ever been afflicted with insanity, or with pulmonary, scrofulous, cancerous, or any other hereditary disease? No.

11. Has the party ever had any of the following diseases, viz; Apoplexy, asthma, bronchitis, consumption, cholic, dyphtheria, dyspepsia, dysentery, disease of the heart, dropsy, fits, fistula, gout, insanity, liver complaint, paralysis, palpitation, quinsy, rheumatism, rupture, scarlet fever, spitting of blood, diseases of the urinary organs, disease of uterine organs

If so, state cause, character, frequency, and duration of the disease, and whether a perfect recovery. No.

12. Has the party been afflicted during the last seven years with any severe or acute constitutional disease, and what? No.

13. Is the party now afflicted with any disease or disorder, and what? No.

14. Has the party ever met with any accidental or serious personal injury; if so, what was it? No.

15. Name and residence of the party's usual medical attendant, or (if he have none) of some other medical person to be referred to for information as to his health. Dr. C. Bruckner.

16. Name and residence of an intimate friend to be referred to for similar information. F. Lupel, Vine str.

17. Amount of insurance applied for, $2,000, (two thousand dollars.)

18. Term for which the insurance is desired, and specific plan. Joint life-time, payable at death of the first.

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¶ The first two questions will have the same answers, when the applicant insures his own life; different answers, if he insures the life of another person. The names should be plainly written, and the residence given in full. All the blanks and certificates should be properly filled before sending to the office.

§ If these interrogatories are not explicitly and fully answered, the application will be declined or returned for completion.

19. Has a previous proposal been made for insurance in this or any other company; and, if so, was it accepted or not; and, if accepted, for what amount? Is insured in the Germania, $1,000.

20. Is the party aware that any untrue or fraudulent allegation, made in effecting the proposed assurance, will render the policy void, and that all payments of premiums made thereon, and dividend credits accruing therefrom, will be forfeited? Yes.

|| (Signed) FRAZISKA SCHAEFER.
G. F. SCHAEFER.

Witness:
C. MANTHEY.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

*Questions to be answered by the physician of the party applying for insurance.*

1. How long have you known ?
2. Have you been in the habit of seeing h frequently, and giving h medical attendance, and for what disease?
3. What is h temperament, height, and general appearance?
4. Has the party's parents, brothers or sisters, been afflicted with pulmonary complaints, or any other disease that tends to shorten life; and, if so, what?
5. Has at any time been afflicted with any disease of the brain or nervous system? of the lungs; of the heart, its valves, or the blood-vessels; bowels; stomach; liver; or urinary organs; if so, what? If a female, state condition of uterine organs, and character of labors.
6. Give the stethoscopic character of respiration and heart's action.
7. State the average, rate, and other qualities of the pulse.
8. Has , in your opinion, an hereditary predisposition to any disease? And, if so, what is it?
9. Do you believe that is now in good health?
10. Is now sober and temperate? Has h always been so?
11. Are the party's habits active or sedentary?
12. Do you believe that possesses a healthy constitution?
13. What, in your opinion, is the party's prospect for longevity?

Dated at , 186 .
(Signed,)

I certify that I have been personally acquainted with George F. Schaeffer, of Cincinnati, during the last ten years, and do believe that his habits of living are temperate, and that he is now in good health, and does ordinarily enjoy good health, and that I know of no constitutional infirmity or other circumstances affecting him calculated to make an insurance on his life more than usually hazardous.

Dated at Cincinnati, this 20th day of July, 1868.
(Signed)

CONNECTICUT MUTUAL LIFE-INS. COMPANY OF HARTFORD, CONN.
(QUI TRANSTULIT SUSTINET.)

No. of policy. Date, 186 . Sum assured, $ . Term of . Proposer, . Residence, . Life of . Residence, . Occupation, . Place and date of birth, . Dated at day of 18 . Age, . Premium, $ . Extra do., $ . Policy, $ . Agents are requested not to fill the above blanks. Agent, at , received day of , 186 . Leave blank.

1869.

## 40 THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

### **Declaration.*

I, Geo. Frederick Schaefer, of Cincinnati, County of Ham., State of Ohio, being desirous of effecting an assurance with The Connecticut Mutual Life Insurance Co. in the sum of two thousand dollars, upon the †life of Franziska Schaefer, of Cincinnati, County of Ham., and State of Ohio, during the whole ‡term of her life, do hereby declare that her age next birthday will be forty-six years; that she is now in good health, of sober and temperate habits, and do usually enjoy good health; and that the following answers and statements are correct and
41 true, in which I have not concealed, withheld, or misrepresented
any material circumstance in relation to the past or present state of her health, habits of life, or condition, which may render an assurance on her life more than usually hazardous, or with which the directors of said company ought to be acquainted. And I do hereby declare that I have an interest in the life of the said Franz. Schaefer to the full amount of the said sum of two thousand dollars. And I do hereby agree that the answers given to the following questions, and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between her and the said company; and that if the same be not in all respects true and correctly stated, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits which may accrue therefrom, shall be forfeited to said company; and I further agree that the assurance hereby proposed shall not be binding on said company, and no policy shall attach until the amount of premium as stated therein shall be paid to said company in the life-time of said assured.

Dated at Cincinnati this 20 day of July, 1868.

‖(Signed) GEO. FREDERICK SCHAEFER.
FRANZISKA SCHAEFER.

Witness:
C. MANTHEY.

§Questions and answers above referred to.

1. Name and residence of the person for whose benefit the assurance is proposed. ¶Give Christian names in full and plainly written.
42 If wife or husband, so state. Geo. Frederick Schaefer, Cincti., O.

2. Name and residence of the person whose life is proposed to be insured. See note as above. If wife or husband, father, mother, brother, or sister of applicant, so state.—Franziska Schaefer, Cincti., Ohio, 638 Race st.

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* This declaration should be made and signed by the person in whose name and benefit the policy is desired. If a wife insures a husband, it should be made in her name, and both should sign it, and the answers to the questions below.

† Insert "my own," if assurance is proposed on the party's own life; if on another's life, insert the person's name.

‡ "Whole term of life," or "term of three, five, or seven, &c., years."

‖ In signing, write the Christian name.

§ If these interrogatories are not explicitly and fully answered, the application will be declined or returned for completion.

¶ The first two questions will have the same answers when the applicant insures his own life; different answers, if he insures the life of another person. The names should be plainly written, and the residence given in full. All the blanks and certificates should be properly filled before sending to the office.

3. Occupation of person whose life is to be insured; and whether married or single.—Photographer's wife.

4. Place and date of birth of the party whose life is to be insured, giving months and days.—Obershopphein, Baden, 9 June, 1833.

5. Age next birthday.—Thirty-six years.

6. Is the party now, and has he always been, of temperate habits?—Yes.

7. Has the party resided out of the United States; and, if so, where,
for what purpose and period, and what was the effect of such
43 residence on his health?—Emigrated to the U. States.

8. Has the party been vaccinated or had the small-pox?—Yes. Had no small-pox.

9. Grandparents living, ; ages, ; health, ; parents living, mother, ages, 75; health, good; brothers living, 3; ages, 50, 42, 37; health, do.; sisters living, 3; ages, 49, 46, 47; health, do.; grandparents dead, ; ages, ; cause of death, ; parents dead father; ages, 50; cause of death, typh. fever; brothers dead, ; ages, ; cause of death, ; sisters dead, 1; ages, 45; cause of death, not known.

10. Has grandparent, parent, brother or sister ever been afflicted with insanity, or with pulmonary, scrofulous, cancerous, or any other hereditary disease?—No.

11. Has the party ever had any of the following diseases, viz: Apoplexy, asthma, bronchitis, consumption, colic, dip'theria, dyspepsia, dysent'ry, disease of the heart, fits, fistula, dropsy, gout, insanity, liver-complaint, paralysis, palpitation, quinsy, rheumatism, rupture, scarlet fever, spitting of blood, disease of urinary organs, disease of uterine
organs. If so, state cause, character, frequency and duration
44 of the disease, and whether a perfect recovery.—No.

12. Has the party been afflicted, during the last seven years, with any severe or acute constitutional desease, and what?—No.

13. Is the party now afflicted with any desease or disorder, and what?—No.

14. Has the party ever met with any accidental or serious personal injury? If so, what is it?—No.

15. Name and residence of the party's usual medical attendant, or (if he have none) of some other medical person to be referred to for information as to his health.—Dr. C. Bruckner.

16. Name and residence of an intimate friend to be referred to for similar information.—C. Blomberg, Race st.

45 17. Amount of insurance applied for.—$2,000, (two thousand dollars.)

18. Term for which the insurance is desired, and specific plan.—Joint life-time, payable at death of the first.

19. Has a previous proposal been made for insurance in this or any other company; and, if so, was it accepted or not, and, if accepted, for what amount?—Is insured in the Germania, $1,000.

20. Is the party aware that any untrue or fradulent allegation, made in effecting the proposed assurance, will render the policy void, and that all payments of premiums made thereon, and dividend-credits accruing therefrom, will be forfeited?—Yes.

(Signed) GEO. FREDERICK SCHAEFER.
FRANCISCA SCHAEFER.

Witness:
C. MANTHEY.
Rec. 228—3

46 *Endorsement on back of declaration.*

### THE CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY.

Questions to be answered by the physician of the party apply' for insurance:

1. How long have you known ?
2. Have you been in the habit of seeing h frequently and giving h medical attendance, and for what desease ?
3. What is h temperament, height, and general appearance ?
4. Has the party's parents, brothers or sisters been afflicted with pulmonary complaints or any other disease that tends to shorten life; and, if so, what ?
5. Has at any time been afflicted with any desease of the brain or nervous system, of the lungs, of the heart, its valves, or the blood vessels, bowels, stomach, liver, or urinary organs? If so, what? If a female, state condition of uterine organs and character of labors ?
6. Give the stethoscopic character of respiration and heart's action.
7. State the average rate and other qualities of the pulse.

47 8. Has , in you" opinion, any hereditory predisposition to any desease; and, if so, what is it ?

9. Do you believe that is now in good health ?
10. Is now sober and temperate ? Has h always been so ?
11. Are the party's habits active or sedentary ?
12. Do you believe that possesses a healthy constitution ?
13. What, in your opinion, is the party's prospects for longevity ?

Dated at , 186 .

(Signed)

I certify that I have been personally acquainted with Franziska Schaefer, of Cincinnati, during the last ten years, and do believe that her habits of living are temporate, and that she is now in good health, and does ordinarily enjoy good health, and that I know of no constitutional infirmity or other circumstances affecting her calculated to make an insurance on her life more than usually hazardous.

Dated at Cincinnati this 20th day of July, 1868.

(Signed)

48 CONNECTICUT MUTUAL LIFE-INSURANCE COMPANY OF HARTFORD, CONN.

No. 86708 of policy; date, July 25, 1868; sum assured, $2,000; term of joint lives; proposer, George F. and life of Francisca Schaefer; residence, Cincinnati, O.; occupation, photographer, & wife; place and date of birth; dated at , 20 day of July, '68; age, 47, 35; premium, $108.06; extra do., $ ; policy, $ . Agents are requested not to fill the above blanks. C. W. Ellis, gen'l agent, Cincinnati, O.; received 27 day of July, 186 ; leave blank. 1868.

49 No. 86708] EXHIBIT F.

$54. CINCINNATI, *25th July*, 1868.

I hereby acknowledge a credit or forbearance of fifty-four dollars of the premium on my policy No. 86708, issued by the Connecticut Mutual

Life-Insurance Company, which amount shall be a lien on said policy at 6 per cent. per annum until paid or adjusted by return of surplus premium.

G. F. & FRANZ. SCHAEFER.

No. 86708.] EXHIBIT G.

$54. CINCINNATI, O., *July 25th*, 1869.

I hereby acknowledge a credit or forbearance of fifty-four dollars of the premium on my policy No. 86708, issued by the Connecticut Mutual Life-Insurance Company, which amount shall be a lien on said policy at 6 per cent. per annum until paid or adjusted by return of surplus premium.

$54.06.
3.24.
———
57.30.

G. F. SCHAEFER.

No. 86708.] EXHIBIT H.

$54. CINCINNATI, O., *July 25th*, 1870.

I hereby acknowledge a credit or forbearance of fifty-four dollars of the premium on my policy No. 86708, issued by the Connecticut Mutual Life-Insurance Company, which amount shall be a lien on said policy at 6 per cent. per annum until paid, or adjusted by return of surplus premium.

54.06.
6.48.
———
60.54.

GEO. F. & C. SCHAEFER.

50 UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the records and proceedings in the case of Francisca Schaeffer *vs.* The Connecticut Mutual Life-Insurance Company, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati this 25th day of September, A. D. 1874, and in the 99th year of the Independence of the United States of America.

Attest:
[SEAL.] THOS. AMBROSE,
*Clerk U. S. Cir. Ct., S. D. O.*

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Ohio, greeting.

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Francisca Schaefer and the Connecticut Life-Insurance Company, a manifest error hath happened, to the great damage of the said Connecticut Life-Insurance Company, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

52 Witness the honorable M. R. Waite, Chief-Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] THOS. AMBROSE,
*Clerk of the Circuit Court of the United States*
*for the Southern District of Ohio.*

53 No. 1552.

UNITED STATES OF AMERICA, *ss:*

To Francisca Schaefer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein the Connecticut Mutual Life-Insurance Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgement in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief-Justice of the said Supreme Court of the United States, this 14th day of July, A. D. 1874.

[SEAL.] PHILIP B. SWING,
*Judge of the District Court of the United States for the said district.*
(No associate justice or circuit judge being present.)

We hereby accept service of above citation on behalf of Francisca Schaefer.

PUGH, THROOP & BRANNAN,
*Plaintiff's Attorneys.*

(Indorsement on cover:) No. 228. The Connecticut Mutual Life-Insurance Company, plaintiff in error, vs. Francisca Shaefer, S. Ohio, C. C. U. S. Filed 4th November, 1874.

*Law Bulletin, Print, 17 West Eighth Street.*

# Supreme Court of the United States,

OCTOBER TERM, 1876.

## The Connecticut Mutual Life Ins. Co.

PLAINTIFF IN ERROR,

*versus*

## Francisca Schaefer,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

GEO. HOADLY,
EDGAR M. JOHNSON,
*Counsel.*

# Supreme Court of the United States,

OCTOBER TERM, 1876.

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## The Connecticut Mutual Life Ins. Co.

PLAINTIFF IN ERROR,

*versus*

## Francisca Schaefer,

DEFENDANT IN ERROR.

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## ABSTRACT OF PLEADINGS.

This cause comes into this Court by writ of error from a judgment of the Circuit Court of the United States, in the Southern District of Ohio, rendered at the April Term, 1874.

The declaration is upon a policy of insurance issued by plaintiff in error on the 25th day of July, 1868, to George F. and Francisca Schaefer, in the sum of two thousand dollars, upon their joint lives, loss payable to the survivor of them, within ninety days after due notice and proof of the death of either of said assured parties, in consideration of an annual premium of $108.06, paid and to be paid to said insurance company on or before the 25th day of July of each and every year. The various conditions of the policy are set forth in detail, and it is averred that defendant in error in all things complied with said conditions; that said George F. Schaefer died on the 15th day of February, 1871, whilst said policy was in full force, of which due notice and proof of loss was furnished said insurance company, and that, though more than ninety days has elapsed since said proof of loss was so by aforesaid furnished, said company has wholly refused and neglected to pay to said Francisca Schaefer said sum of two thousand dollars, though by the terms of said policy of insurance it was bound so to do, and prays judgment.

To this declaration plaintiff in error pleaded the general issue. The case being submitted to a jury, a verdict was returned for the full amount claimed, and judgment entered on said verdict for $2,157.20, together with costs.

## STATEMENT OF FACTS.

On the 25th day of July, 1868, George F. and Francisca Schaefer procured to be issued to them, by the Connecticut Mutual Life Insurance Company, a policy of insurance upon their joint lives, loss payable to the survivor upon the death of either; the annual premium to be paid was $108.06, part in cash and part in the forbearance notes of the assured (Record, pp. 11 and 27).

At the date of the issuing of said policy, the assured were husband and wife; on the 1st day of July, 1869, Francisca Schaefer commenced proceedings for divorce in the Court of Common Pleas of Hamilton county, Ohio (Record, p. 8), and on the 6th day of January, 1870, a decree of divorce was by her obtained—of this nor of the commencement of said suit the company had no *actual* knowledge (Record, p. 8).

By said decree alimony was awarded to said Francisca Schaefer, out of the estate of said George F. Schaefer, which was collected in said suit by her (Record, p. 7).

There was no issue of said marriage; both said George F. Schaefer and Francisca Schaefer married subsequent to said divorce, and at the time of the trial of the cause in the Court below, said Francisca Schaefer was living with the second husband, one Ernest W. Tillner (Record, p. 8).

After said divorce Francisca Schaefer continued to pay the premium on said policy, and caused to be executed in part payment thereof, without the knowledge or consent of George F. Schaefer, a forbearance note (Exhibit H, Record, p. 27), apparently signed by George F. and C. Schaefer, said signature being appended thereto by a son of said Francisca Schaefer, the issue of a former marriage, by her authority and direction (Record, p. 8).

At the trial in the Circuit Court, Francisca Schaefer was called as a witness in her own behalf, and on cross-examination she was asked whether she had not stated to George H. Harries, her attorney in the divorce proceedings, in order that he might insert the same in her petition for divorce, as a ground for the same, that her husband, George F. Schaefer, had been an habitual drunkard for more than three years prior to the date of the filing of her said petition, which was admitted to have been filed on the 1st day of July, 1869, and she denied that she had made such statement, and therefore defendant called as a witness said George H. Harries, and propounded to him the following question (Record, p. 8): "State whether or not the plaintiff did not tell you, when you were preparing her petition for divorce, that George F. Schaefer had been an habitual drunkard for more than three years prior to that date," to which question counsel for defendant in error objected, and the Court sustained said objection, to which plaintiff in error excepted.

George F. Schaefer died on the 15th of February, 1871, and it was admitted that due proof of death had been made to plaintiff in error.

The application for insurance on the joint lives of the assured was offered in evidence (Record, pp. 19, 20, 21, 22 and 23), and testimony tending to prove that the statements were false and untrue—that said Schaefer was not at said date a temperate man; and plaintiff in error also adduced testimony tending to show that said George F. Schaefer had had delirium tremens; that he had impaired his health by intemperance, and that he had committed suicide.

Defendant in error offered evidence tending to contradict the testimony thus offered, save that said Schaefer committed suicide, and as to this offered evidence tending to show that when said Schaefer did commit suicide he was of unsound mind.

Plaintiff in error, on the trial of the case, prayed the said Circuit Court to give a number of special charges to the jury, which prayer was refused, to which exceptions were reserved, as also to the charges which were given by said Court, all of which will fully appear by reference to the Bill of Exceptions (Record, pp. 9, 10 and 11).

## ASSIGNMENT OF ERRORS.

The Circuit Court erred in its refusal to give to the jury the first, second, third, fourth, fifth and sixth special charges asked by plaintiff in error (Record, p. 9); said Court erred in giving the first, second, third and fourth charges contained in the general charge to the jury (Record, pp. 9 and 10); said Court erred in sustaining the objection to the question put to the witness, George H. Harries (Record, p. 8).

## ARGUMENT.

The policy in this case was taken out by the Schaefers on what is technically called "part note, part cash plan"—that is to say, the premiums for a certain time were to be paid partly in cash and partly by the forbearance notes of the assured. The original of these notes were offered in evidence by plaintiff in error on the trial of this cause (Record, pp. 26 and 27). An examination of these originals, which are attached to the Bill of Exceptions herein, will show that a printed blank form, provided by the company, was used. This form is printed in the singular number, and although the notes in question purport to be signed by both George F. and Francisca Schaefer, yet in the printed body of the note the words "I" and "my" are used, instead of "we" and "our."

It will be remembered that these parties were divorced on the 6th day of January, 1870, yet on the 25th day of July of that year, in part payment of the premium on said policy of insurance, without either the authority, consent or knowledge of her former husband, defendant in error authorized her son to execute and deliver to plaintiff in error, without any knowledge on its part of the divorce, a forbearance note for $54, in the name of "Geo. F. & C. Schaefer."

Upon this state of fact we asked the Circuit Court to charge the jury: "If you find that the premium note given for renewal July, 1870, was not signed by plaintiff and deceased, George F. Schaefer, or by some one authorized by them jointly so to do, then there can be no recovery in this case; the authority of one so to sign said note is not binding on the other, and when defendant shows by the evidence that said note was not signed by either of said parties, the burden of proof is then upon the plaintiff to show that it was signed by some one authorized by them jointly so to sign the same in their joint names" (Record, p. 9).

This charge the Court refused to give, but on the contrary charged the jury: "In regard to the premium note of July, 1870, purporting to be signed by George and Francisca Schaefer, if the same was signed by any one authorized by the plaintiff alone so to do, said authorization was sufficient, without said authority being also given by said George F. Schaefer" (Record, p. 10).

The refusal to give the charge prayed for by us, and the giving the charge above recited, we contend was clearly erroneous.

By its express terms the policy became void and of no effect if the premiums thereon were not paid on or before the 25th day of July in each and every year. The payment which the company was entitled to receive was not only the part due in cash, but also the obligation or forbearance note of the assured for that portion for which the company gave credit, and it was entitled to have the same so executed as to be *binding* upon both George F. and Francisca Schaefer.

Would it be for a moment contended that if, instead of this being a contract of insurance, it had been a contract to build a house by the company for George F. and Francisca Schaefer, entered into whilst the relation of man and wife existed between them, part of the agreed price for construction to be paid in cash and part by the joint promissory note of the Schaefers; that the house being finished after she had obtained a divorce from him, and collected the alimony awarded to her out of his estate, that either she could herself, or by authority delegated by her to another, execute or cause to be executed, without his knowledge or consent, their joint promissory note for the deferred payment, so as to bind him? We apprehend not.

The company were entitled to the execution of such an instrument, in payment of the deferred premium, as would be binding in law upon both George F. and Francisca Schaefer. To be binding upon him it must have been executed by himself, or by some one authorized by him so to do. We know of no exception to this rule of law. Because the policy might in a certain event, *i. e.*, her survivorship, inure to her benefit, it conferred upon her no right to bind him without his knowledge, consent or authority. The marriage tie had been dissolved—they were in law as strangers to each other—howsoever they may have theretofore been jointly interested in the policy in question, growing out of their former marital relations, that joint interest had ceased and determined. What right, then, she had to bind him by the forbearance note of July 25th, 1870, we must confess is beyond our comprehension.

But an examination of this instrument (Record, p. 27) will show that it is binding on neither of the parties. It purports to be signed "Geo. F. & C. Schaefer." We have shown that Geo. F. Schaefer never authorized any one to sign said paper for him; that his name was affixed without his knowledge or consent, and *C.* Schaefer is the name of no one in anywise connected with the policy or the transaction, save it be that of Mrs. Schaefer's son by a former marriage, who, as the Record shows, was authorized by her to go to the office of plaintiff in error and sign the forbearance note in *her* name and that of her former husband.

We submit, therefore, that the refusal to give the charge asked by us in this behalf was clearly erroneous, as was the action of the Circuit Court in giving the charge which we have already quoted.

## II.

The next error which we assign is, that the Circuit Court erred in refusing to permit us to ask and have answered the question propounded to the witness Harries as to whether or not Francisca Schaefer had not stated to him, for the purpose of having the same averred in her petition for divorce, that George F. Schaefer had been an habitual drunkard for more than three years prior to the time of filing said petition.

It needs no argument upon our part to show that this was a matter of great importance to plaintiff in error.

The petition for divorce was filed July 1, 1869 (Record p. 8), the application by defendant in error for policy on the life of her then husband was made on the 20th day of July, 1868. In that application (Record p. 22) she expressly states, in answer to a question on that subject, that said George F. Schaefer is and always has been of temperate habits, and by that instrument (Record p. 21) it is expressly stipulated that the answers to the questions propounded therein shall be in all respects true and correct, and if the same shall be in any respect untrue and incorrect, then and in that case the policy issued in conformity with said application shall be void and of no effect.

If then she knew that her then husband was an habitual drunkard at the time said application was made, and falsely stated that he was a temperate man, it was of great importance to plaintiff in error to show that fact, and certainly her own statement, made within a year after she made said application, that he had been an habitual drunkard for more than three years, tended strongly to prove that her answer to the question in the application was untrue, and known to be so by her when made.

Again, if she had made such a statement to Harries, as she denied that she had done so when the question was asked her directly (Record p. 8), it was competent for plaintiff in error to prove the fact to be otherwise for the purpose of contradicting her.

The objection to our question was sustained by the Court below on the ground that Harries, being the attorney for Mrs. Schaefer in her divorce suit, received the statement from her as to her husband being an habitual drunkard in his professional capacity, and that the same was not, therefore, competent evidence (Record p. 8).

Is this position tenable?

This query must be answered in conformity with the adjudications of the courts of Ohio upon the subject, and the construction which they have placed upon the statutes of that State relating thereto.

*Hinde* v. *Vattier*, 5 Peters 398--401.
*Sims* v. *Hundley*, 6 Howard, 1--6.

An examination of the Code of Civil Procedure in force in Ohio develops this state of the law.

Section 310 of that instrument provides that:

> "No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same."

Section 314, before it was amended by the law of 1870, provided, among other matters, in one of its last two subdivisions, that an attorney should be incompetent to testify.

> "Concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent."

In 1870 the section was amended in divers particulars, and in one by inserting the word "express" before the word "consent," where the language occurs as above quoted, and also adding three new subdivisions thereto.

Sayler's Statutes, vol. 3, p. 2378.

Section 315 of the Code provides that

> "If a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney * * * on the same subject within the meaning of the last two subdivisions of the preceding section."

What, then, is the "express consent" which the client must give in order to make the attorney a competent witness? Assuredly such "express consent" may either be by word of mouth, in writing, or in the manner prescribed by the 315th section of the Code, *i. e.* by the client offering himself as a witness. Any other construction would render this section wholly inoperative, whilst the rule of statutory interpretation is that such construction must be given that force and effect will be given to the entire statute, if it be practicable so to do.

Precisely what the Legislature of Ohio intended to effect by this amendment to the 314th section of the Code, is somewhat difficult to determine. It may have been, and doubtless was, to provide, in cases where the client did not himself become a witness, that in order that the attorney might be competent, it was required that he should have the "express" and no equivocal or questionable consent of his client so to do, but if the client did become a witness, the "express" consent, by the 315th section, was by operation of law. This construction gives full force and effect to both the sections in question, and if the Legislature had intended to have given any other, it would have repealed section 315, when it amended section 314. The former section, however, not having been repealed, but still standing in full force, effect must be given to it.

It is true that the question which was propounded to Mrs. Schaefer on the subject was on cross-examination, but it must be remembered that she had voluntarily offered herself as a witness in her own behalf, and thereby became a witness for all legitimate purposes.

The Supreme Court of Ohio, in *King* v. *Barrett*, 11 Ohio State R., 261--264, have passed upon this question, as also upon the construction of section 314 (before its amendment) and 315 of the Code of Civil Procedure.

The syllabus of that case is as follows:

> "Communications made by a client to his attorney, with a view to professional advice or assistance, are privileged; and Courts will not require nor permit them to be divulged by the attorney without the consent of his client, whose privilege it is.
>
> "But if a party to a suit offers himself as a witness, and gives evidence generally in the case, he thereby loses his privilege, and under the Code of Civil Procedure (sec. 315) consents to the examination of his attorney touching such admissions as are pertinent to the issue.
>
> "At whatever stage of the trial a party thus offers
> himself as a witness, he may, on cr
> be interrogated as to such admissi
> cations made to his counsel, and the
> either as evidence in chief or for
> impeachment."

Judge Scott, in announcing the opinion of the Court in this case, used the following language:

> "Our Code of Civil Procedure has materially changed the rule of the common law as to the competency of witnesses. It declares, in the 310th section, 'that no person shall be disqualified as a witness

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> "At whatever stage of the trial a party thus offers himself as a witness, he may, on cross-examination, be interrogated as to such admissions or communications made to his counsel, and they may be proved, by the attorney
> either as evidence in chief or for the purpose of impeachment."

Judge Scott, in announcing the opinion of the Court in this case, used the following language:

> "Our Code of Civil Procedure has materially changed the rule of the common law as to the competency of witnesses. It declares, in the 310th section, 'that no person shall be disqualified as a witness

> in any civil action or proceeding, by reason of his interest in the event of the same as a party or otherwise.'
>
> "And while in the 314th section the common law rule is affirmed that an attorney shall be incompetent to testify concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent,' the 315th section provides that 'if a person offer himself as a witness, that is to be deemed consent also to the examination of an attorney * * * on the same subject matter.'
>
> " In the case before us, Barret being a party, voluntarily offered himself as a witness generally, in his own behalf. In doing so he waived all the protection which the law would otherwise have afforded to communications made by him to his attorney pertinent to the issue on trial. Those communications were no longer privileged, and having made himself a witness and given evidence generally in the case, he was bound, on proper inquiry, to tell the *whole* truth, and his testimony became liable to all the usual tests and to impeachment, like that of any other witness, and for this purpose his attorney might be called to prove statements and admissions which his client, as a witness, denied. Indeed we are satisfied that his attorney might be called to prove such admissions as evidence in chief."

But it may, and doubtless will, be urged by counsel for defendant in error that the amendment to the 314th section of the Code repeals by implication the 315th section.

Repeals by implication are not favored in Ohio.

As early as 1828 the Supreme Court, in the case of *Ludlow's heirs* v. *Johnson*, 3rd Ohio, 553-564, through Judge Hitchcock, who announced the opinion, said:

> "The law in question is not expressly repealed by the last cited act.
>
> "If repealed at all, it is done by implication. When the provisions of two statutes are so far inconsistent with each other that both can not be enforced, the latter must prevail. But if by fair course of reasoning the two can be reconciled, both shall stand. When the Legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an express repeal. No Court will, if it can be consistently avoided, determine that a statute is repealed by implication."

So also in the case of *Dodge* v. *Gridley*, 10 Ohio, 178, it was held:

> "When two affirmative statutes exist, one is not to be construed to repeal the other by implication, *unless they can be reconciled by no mode of interpretation.*"

In the case of *Ohio ex rel Evans* v. *Dudley*, 1st Ohio S., 437-441, Judge Ranney in announcing the opinion of the Court, used the following language:

> "The rule by which we should be guided in pursuing the inquiry is well settled. As repeals by implication are not favored, *the repugnancy between the provi-*

> *sions of two statutes must be clear, and so contrary to each other that they can not be reconciled, in order to make the latter operate a repeal of the former.* This rule is the result of a long course of decisions." * * *

*Cass* v. *Dillon*, 2d Ohio State, 607, holds:

> "The rule that repeals by implication are not favored, is applicable to the inquiry, whether any particular enactment has ceased to be in force on account of repugnancy to the new Constitution.
>
> "The repugnancy which must cause the law to fall, must be necessary and obvious: if by any fair course of reasoning the law and constitution can be reconciled, the law must stand.
>
> "An enlarged meaning, beyond the import of its words, will not be given to one law in order to repeal another by implication."

In *Randebaugh* v. *Shelley*, 6 Ohio S., 307-316, Chief Justice Bartley, in delivering the judgment of the Court, said:

> "The maxim, *leges posteriores priores contrarias abrogant*, does not apply, except where the inconsistency or repugnancy is such that the two provisions can not stand as cumulative or concurrent rules of action, so that the latter statute, by its necessary operation, abrogates the former. Repeals by implication are not favored, especially under our present Constitution."

So, also, in the case of *Gallup* v. *The Commissioners of Lorain County*, 20 Ohio St., 324-330, Judge Welch used the following language in announcing the opinion of the Court:

> "The act of 1861 contains no express repeal of that section of the school law; while it does expressly repeal two other acts, which had been passed to 'regulate the fees of county auditors.' Does it repeal the 41st section of the school law by implication? We think not. There is no necessary or irreconcilable conflict between the two. Both may stand and have effect * * * under the well known rule of law that repeals by implication are not to be favored. * * * "

In the case of the *State ex rel Olds* v. *The Commissioners of Franklin Co.*, 20 Ohio St., 421-424, Judge McIlvaine, in delivering the judgment, said:

> "The rules for the construction of statutes in cases of this kind have been announced frequently by the Court, namely: That the doctrine of statutory repeals by implication is not favored, and that such repeals will not be declared unless they are necessarily implied. And that statutes *in pari materia* should be so construed as to give effect to all their provisions; and if they can be construed so as to stand well together, there is no repeal by implication."

See also—

*Shunk* v. *First National Bank*, 22 Ohio St., 508-515.

*Ohio* v. *Davis,* 23 Ohio St., 434-445.

The doctrine thus firmly established in Ohio, has also been declared in this Court in equally strong terms.

In the case of *Wood* v. *The United States,* 16 Peters, 342, it is held:

> "There must be a positive repugnancy between the old law and the new for the collection of the revenue, before the old law can be considered as repealed by implication; and even then the old law is repealed by implication only, *pro tanto,* to the extent of the repugnancy."

So also in the case of *The Distilled Spirits,* 11 Wallace, 356, does this Court decide:

> "All the sections can stand together; and where that is the case one does not repeal or supersede the other, *as repeals by implication are not favored."*

Mr. Justice Bradley, delivering the judgment of the Court, said:

> "Statutes *in pari materia,* like the acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the acts can reasonably stand together."

So also it is held in Henderson's Tobacco, 11 Wallace, 652:

> "Although a former statute is impliedly repealed by a subsequent one plainly repugnant to it, or so far as the later statute's making new provisions is plainly intended for a substitute of the earlier one, yet a repeal is not to be implied where the powers or directions under the latter acts are such as may well subsist together with those under the earlier."

Mr. Justice, Strong in deciding this case, said:

> "Where the powers and directions under several acts are such as may well subsist together, an implication of repeal can not be allowed."

The same doctrine is again affirmed, in the same volume, in *United States* v. *Tynen*, p. 92, in which Mr. Justice Field, announcing the opinion of the Court, said:

> "There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both, if possible."

We cite also, in support of this proposition—

*Morlot* v. *Lawrence*, 1 Bl. C. C. R., 609.
*United States* v. *Smith*, 2 Bl. C. C. R., 127.
*Cote* v. *United States*, 3 N. & H., 64.
*United States* v. *Cigars*, 1 Wool, 123.

Having thus shown the settled doctrine of this Court and that of the Supreme Court of Ohio, the statutes to which construction is to be given being of that State, we deem it unimportant to examine the decisions of other tribunals, although numerous and almost uniform in support of our proposition.

Mr. Justice Thurman, than whom no more profound jurist has graced the bench of Ohio, in *Cass* v. *Dillon*, 2 Ohio S. *supra*, in the course of his opinion, asks:

> " Is there any necessary and obvious 'inconsistency between this section and the law before named, enacted under the old Constitution?' Are they 'so contrary to each other that they *can not* be reconciled?' is there no 'fair course of reasoning,' 'no mode of interpretation' by which this can be done? These are the questions to be asked, according to the authorities, and upon the answer that may be given, depends the decision of the point."

Examine the two sections of the Code of Ohio which we are now considering, in the light of the rules thus laid down. What difficulty is there in reconciling them? What straining of interpretation is necessary? what departure from a fair course of reasoning is requisite in order that they shall both be permitted to stand? Where is there any necessary and obvious inconsistency between the sections in question?

We think that we have conclusively shown that there is no conflict between them, and that both are capable of being enforced without interfering with each other.

It will doubtless be contended by our learned adversary that section 315 can have no application to section 314, as the same now stands on the statute book, and having nothing on which it can operate, must of necessity be repealed by implication. Let us briefly examine this position.

Section 315 is as follows:

> "If a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney, clergyman or priest, on the same subject, within the meaning of the last two subdivisions of the preceding section."

2 S. & C. Stat. 1038.

But when the Legislature amended section 214 by inserting the word "express" before consent, it also added several new subdivisions to the section, so that as that section stands now, "the last two subdivisions of the preceding section" have no referrence whatsoever to either "attorney, priest or clergyman."

3rd Sayler's statutes, 2378.

In order then to ascertain the force and effect that is to be given to section 315, if the rule be that all laws must have effect given to them if possible so to do, we are remitted to an examination of section 314 as it originally stood, and thereby we are afforded the solution of the difficulty. "The last two subdivisions of the preceding section," are as follows:

> "An attorney concerning any communication made to him by his client, in that relation, or his advice thereon, without his clients consent," "a clergyman or priest concerning any confession, &c., &c."
>
> Swan's Statutes p. 663

Does it then require any forced construction to make the present application of the effect of the provisions of section 315? Assuredly not—it must be construed as governing and referring to the same subdivision of section 314 as amended as it did in the original section, whether they be the last or first two, so long as those subdivisions are substantially incorporated into and now form part of that section, unless we are to be compelled to follow the shadow and not the substance.

We apprehend that we shall not be obliged so to do, so long as the rule is that "*The repugnancy between the two statutes must be clear, and so contrary to each other that they can not be reconciled, in order to make the latter operate as a repeal of the former.* The rule is the result of a long course of decisions."

*Ohio ex rel. Evans v. Dudley, supra.*

If the section 315 of the Code of Civil Procedure of Ohio has not been repealed by implication, and to so hold would require this Court not only to reverse itself but to disregard entirely the unbroken line of decisions of the Supreme Court of Ohio, it of necessity follows that the Circuit Court erred to the prejudice of plaintiff in error in not permitting the question propounded to the witness Harries, to be answered.

## III.

The undisputed facts of this case show that the policy of insurance in question was issued on the joint lives of Geo. F. and Franciscoa Schaefer, as husband and wife. This relation existing at the time of the issuing of said policy, each had an indisputable insurable interest in the life of the other; but prior to the commencement of this action, the wife had secured a divorce, been awarded alimony out of the husband's estate, which she had collected by an execution at law, and both she and he had each married again. Under these circumstances we asked the Court to charge the jury:

*First:* If you find from the evidence that at the time of the death of George F. Schaefer plaintiff had ceased to have any insurable interest in his life, then she cannot recover in this case except the amount of premiums paid by her to the defendant on the policy issued herein, from the time of the taking out of the same up to the date of plaintiff's ceasing as aforesaid to have an insurable interest in the life of said deceased.

"*Second:* If you find from the evidence that plaintiff had no insurable interest in the life of said George F. Schaefer at the time of his decease, then there can be no recovery in this case.

"*Third:* If you find from the evidence that plaintiff was, before the decease of George F. Schaefer, divorced from him, awarded alimony by decree of Court out of the estate of her said husband, which she had collected, and had married again before the trial of this cause, then I charge ou that she can not recover in this case.

"*Fourth:* Wagering policies of life insurance are void in law, and if plaintiff was divorced from said Schaefer and awarded and collected alimony out of his estate prior to his decease, then I charge you that her insurable interest in his life ceased, and, as far as she was concerned, said policy thereafter became and was a wagering policy, and no recovery can be had by her thereon.

"*Fifth:* If you find from the evidence that plaintiff was, before the decease of said George F. Schaefer, divorced from him, awarded alimony out of his estate, which she had collected prior to the trial of this cause, and had married again to another, then she cannot recover in this case upon the ground that she had the insurable interest which a wife has in the life of her husband." (Record P. 9.)

All of these charges the Court refused to give, to which refusal exceptions were reserved, and thereupon the Court charged, among other things:

"The terms of the policy do not stipulate against the divorce of the parties, and if its effect be as claimed by the defendant, it must be the legal result of the decree. This defense is based upon the proposition that to entitle the plaintiff to a recovery, there must have existed in her an insurable interest at the time of the death of George F. Schaefer. If this proposition be not true, it is unnecessary for us to inquire whether, in this particular case, the decree of divorce had the effect claimed by the defendant. In England it seems now to be the settled law that it is not necessary that the insurable interest should exist at the time of his death, and such has been the doctrine held by some of the courts of the United States, and such I charge to be the law in this case.

"*Third:* If there could have been a doubt as to the insurable interest of a wife in the life of her husband, such doubt can no longer exist, as it is now expressly vested by the statute of Ohio; such an insurable interest existing in the plaintiff in the life of George F. Schaefer, at the issuing of the policy, it was not necessary that such interest should have existed at the time of his death. If, therefore the decree of divore did have the effect to extinguish all insurable interests in the plaintiff, it will not prevent her recovery in this case." (Record P. 10.)

To the giving of said charges plaintiff in error excepted. (Record P. 2.)

The question is thus squarely presented, as to the right of a recovery on a policy of life insurance, where an insurable interest existed at the inception of the contract, but had ceased to exist before the death of the assured.

Defendant in error had certainly no insurable interest in the life of George F. Schaeffer at the time of his decease. She not only had been divorced, but, by a decree of Court in her divorce suit, she had been fully satisfied for each, every and all claim that she had in his estate; she had married again, and there had been no issue born of her first marriage.

It certainly would not be contended that she had such an insurable interest in the life of Schaefer after her divorce, and the awarding and collecting of alimony, that she could have then procured a policy upon his life. The interest which a wife has in her husband's life is that of support, and therefore she has an assurable interest. *Gambs* v. *Covenant Mut. Life Ins. Co.*, 50 Mo. 44. When, therefore, the right to support ceases, as it had in the case at bar, the insurable interest is at an end.

Our contention is, that at the time of the decease of George F. Schaefer, so far as defendant in error is concerned, the policy in question was a mere wagering one in her hands, or at best, she was only interested therein, and entitled to recover theron, to the extent of the premiums that she had paid to keep the same alive.

This Court has already decided that a mere wagering policy is void.

*Cammack* v. *Lewis*, 15 Wallace 643.

Upon what principle, then, when one ceases to have any interest in the life covered by the policy, can it be claimed that such person has the right to keep in force an insurance on such life? Is it anything but a wagering policy under such circumstances? That we may properly understand and be able to ascertain precisely the rights of Francisca Schaefer in the policy in question, we must first determine what life insurance is.

It has been said that it differs from fire insurance in this, that it is not indemnity, but something more or, in other words, whilst in case of fire insurance the protection to be afforded to the insured is measured by the value of the thing covered by the risk, in life insurance ordinarily no such object enters into the contract, because the life covered by the risk cannot be measured in value, in all cases, in dollars and cents, and therefore life insurance is not simply indemnity.

This is true, but in a restricted and qualified sense; for it is impossible to conceive, save in a mere wagering policy, which as we have before seen is void in law, that an insurable interest can exist, disconnected with the right of indemnifying by insurance against the loss of that interest, in any other case than where one insures his own life. Assuredly the exact value of a life to a husband or a wife can never be determined in dollars, though where the insurable interest arises simply because the relation of debtor and creditor exists, it may be.

Where the interest to be protected is one arising from marital relations, is it not then akin to those covered by a valued marine policy, the subject matter of the risk being by agreement of the parties to the contract valued, and the value so fixed being thus definitely determined?

If life insurance be at all indemnity, as some of our best authorities on this subject seem to think (May on Insurance, sec. 117), it must be on the hypothesis that the value of the indemnity has been fixed by the agreement of the parties to the contract.

And if this be so, then the inflexible rule that governs fire insurance, that an insurable interest must exist at the time of the loss, as well as at the inception of the policy, is applicable to life insurance; for assuredly one cannot claim indemnity where all interest in either the property or the life covered has ceased.

And the application of the rule to life insurance, if wagering policies are void, would lead to equitable results, because it would protect to its fullest extent the interest of the beneficiary in the policy, in the life of the assured. If all interests have ceased and determined, as in case of fire insurance, where the assured had parted with all rights in and to the property covered by the risk, all protection under the policy should be at an end; if, however, the interest has not been fully lost, but only partially satisfied, then again, as in fire insurance, the recovery should be measured by the value of the interest.

And this is precisely the position which we assumed in the case at bar in the charges which we asked in the Circuit Court. Though Francisca Schaefer had lost all interest which she had theretofore had in the life of her husband, because of the severance of the marital relations between them, and to that extent had ceased to have an insurable interest in his life, yet we admitted that she had an interest in the policy in question equal to its surrender value, and we, therefore, prayed the Court, by our first charge (Record p. 9), to instruct the jury to allow her not only the surrender value of the policy, but a sum much greater, to-wit: the full amount of premiums paid by her from the date of issuing the policy down to the time that she ceased to have an insurable interest in his life.

What other or greater interest by way of indemnity had she, after divorce, in the life of George F. Schaefer?

If any other rule of interpretation as to life policies be adopted, wagering policies, though condemned by the law, are in fact enforced and supported.

Whenever the insurable interest ceases, the policy, per force, becomes a mere wagering one.

> " A policy obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is innocent wagers, are at common law valid ; but wagers involving immorality or crime, or in conflict with any principle of public policy, are void.
>
> " To which of these classes, then, does a wagering policy of insurance belong ? Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, " *but furnish strong temptations to the party interested to bring about, if possible, the event insured against.*"

*Ruse* v. *The Mut. Ben. Life Ins. Co.*, 23 N. Y. 516.

> " In the second place, it is contrary to the general policy of the law respecting insurance, in that it may lead to gambling or speculating contracts upon the chances of human life. *The general rule recognized by Courts has been, that no one can have an insurance on the life of another, unless he has an interest in the continuance of that life.*"

*Stevens* v. *Warren*, 101 Mass. 564.

It has been decided that a woman engaged to be married has an insurable interest in the life of her betrothed.

*Chisholm* v. *Nat. Cap. Life Ins. Co.*, 52 Mo. 213.

And yet would it be claimed that an insurance effected to protect such an interest, which had ceased and determined by the refusal to carry out the engagement of marriage, suit for the breach, verdict and collection of damages by execution at law, and the actual marriage of the party whose interest had been thus insured to another, would be anything thereafter but a mere wagering policy?

What interest would the party so insured have in the continuance of that life?

Again, a creditor, to protect his claim, insures the life of his debtor. The claim is paid. Does not that policy, save as to its surrender value, become a mere wagering one thereafter, in the hands of the creditor?

Would not "such policy, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptation to the party interested to bring about, if possible, the event insured against?"

In the case at bar, what interest had Mrs. Schaefer in the *life* of her former husband? Surely none. She was concerned alone, not in its duration, but in its cessation.

The very reason given by the law, in its refusal to support mere wagering policies, applies in all its force to the claim of defendant in error in this case, viz., that she was interested in the *death*, not the *life*, of her former husband.

We are aware that the position which we have here maintained, that life insurance partakes of the nature of indemnity in certain cases, and that an insurable interest is only necessary at the inception, is apparently somewhat in conflict with a doctrine of this Court, in *Insurance Company* v. *Bailey*, 13 Wallace, 613.

We say apparently, because we think, upon an examination of the language used by Mr. Justice Clifford in that case, and the authorities cited, the conflict will be found to be more imaginary than real.

We quote from the opinion pronounced:

> " Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured.
>
> " Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured can not justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred.
>
> " Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract;

> that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependance or natural affection, in the life of the person insured.
>
> "Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract, as the contract is not merely for an indemnity, as in the marine and fire policies."

Thus it will be seen by an examination of the language used, that the holding of the Court is, not that life insurance is not indemnity, but that it is that and something more. "The contract is not merely for an indemnity, as in marine and fire policies."

In arriving at its conclusion in this case, this Court seems to have relied to a great extent on the English cases cited.

But it must be remembered that prior to the enactment of Statute 14, Geo. III, c. 48, mere wagering policies were sustained in England; that by the provisions of that act they were made void, as were all policies on life in which the beneficiary had no interest.

Keeping in mind these facts, what, then, is the legal conclusion to be drawn from the leading English case of *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365, and also from *Law* v. *London Indisputable Life Policy Co.*, 1 Kay & Johns. 223.

These cases hold that a contract of life insurance is not a contract of indemnity, but a contract in a certain event to pay a certain sum, in consideration of an annual premium; that when a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the ceasing of that interest before the death does not invalidate the insurance under the statute of George III which we have cited.

That is to say, that as wager policies were enforceable prior to the passage of this statute in question, and assurance on life was not, therefore, indemnity, and as by the terms of said statute it was only required that there should be an insurable interest at the time of the inception of the policy, the Court would not extend the provisions thereof, and require that the interest should also exist at the happening of the event insured against.

But would the Courts of England have so held if, at common law, wagering policies had been void? We apprehend not.

Nor do the American cases cited sustain the proposition in question, save in a qualified sense. *Trenton Life & Fire Ins. Co.* v. *Johnson*, 4 Zab. 576, is decided upon the ground that there is no statute in New Jersey against wagering policies.

*Rawls* v. *The American Mutual Life Ins. Co.*, 27 New York, 282, decides that upon the facts of the case, the beneficiaries' insurable interest had not ceased at the time of the happening of the event insured against, and further holds that: "It seems that the contract of life insurance is not one of indemnity merely, and that if the insured had an interest in the duration of the life when he took the policy, he may recover, though the interest ceased."

But on an examination of the opinion pronounced in the case, it will be found that this *semble* rests for its foundation solely on the case of *Dalby* v. *The India and London Life Assurance Co.*; and if that case depends entirely upon the construction to be given to the statute of Geo. III for its solution, as that statute has no force or effect in New York, we are at a loss to understand its applicability.

*Loomis* v. *Eagle Life and Health Ins. Co.*, 6 Gray, 396, holds simply that a father has an insurable interest in the life of his son, and as in that case the interest had continued until the happening of the event insured against, the question which we are now discussing was not before the Court for its consideration.

In *Lord* v. *Dall*, 12 Mass., 118, the question was, whether a single sister had an insurable interest in the life of her brother, and it was held that she had. Chief Justice Parker in delivering the judgment of the Court, said,

> "It is said, that being a contract of assurance, the law on the subject of marine insurance is applicable to it, and, therefore, unless the assured had an interest in the subject matter insured, he is not entitled to his action.
>
> "This position we agree to, for otherwise it would be a mere wager policy, which we think would be contrary to the general policy of our laws, and therefore void."

It was not necessary for the Court, in deciding this case, to go further upon the subject of interest, but if it had been, and the laws of marine insurance been applicable, the well known rule that interest must exist at the time of loss as well as at the inception of the risk, would be decisive upon the question presented in the case at bar.

These are all the cases cited to sustain the dictum of the Court to which we have referred—the English cases resting for their solution on the effect of the statute of George III, whilst in the American none of them directly presented the propositions which we have been discussing, and depend for their support, save in the case in 12 Mass. and 4 Zab., on the case of *Dalby* v. *The India and London Ass. Co.*

On the other hand it has been decided, both in Massachusetts and Indiana, that it is not sufficient that an insurable interest shall exist at the inception of a policy of life insurance—there must be such interest also at the time of the happening of the event insured against.

In the case of the *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind., 117, it was held, that:

> "Although a policy be is sued to one who holds an insurable interest in the life, and be, therefore, valid in its inception, its assignment to one holding no such interest will not sustain an action in favor of the assignee upon the death of the person whose life is insured."

In the case of *Stevens, admr.*, v. *Warren, admr.*, 101 Mass., 564, Judge Wells, in announcing the opinion of the Court, used the following language:

> "In the second place, it is contrary to the general policy of the law respecting insurance: in that it may lead to gambling or speculating contracts upon the chances of human life.
>
> "The general rule recognized by the Courts has been that no one can have an insurance upon the life of another *unless he has an interest in the continuance of that life.*"

In the case cited it was alleged that one Barton having insured his own life, had assigned the policy to Warren, who claimed the same as purchaser; but the Court held that, Warren having no insurable interest in the life of Barton, in his hands the policy was a mere wagering one, and the transfer was, therefore, void.

Confessedly in the cases of *Franklin Life Ins. Co.* v. *Hazzard* and *Stevens, admr.*, v. *Warren, admr.*, an insurable interest existed at the inception of the policies in the beneficiaries—the beneficiaries in each case being the heirs of the person upon whose life the risk was taken; but the moment assignment was made to one having no insurable interest in the life at risk, that instant the policy became a mere wagering one, and no rights thereunder were conferred upon the assignee. Why? Insurable interest existed at the inception of the risk, but it ceased before the happening of the event insured against, and as soon as such interest did so cease, it became a mere wagering policy, and void.

Whether life insurance is indemnity or not, can not be ascertained by any general rule; each case must depend upon itself; but whenever it becomes a mere matter of indemnity, as it must in all instances where the insurable interest arises simply from the right of support, when that right ceases, insurable interest is at an end, and thereafter the policy is a mere wagering one, of no worth to the beneficiary, save in its surrender value.

> "The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is indemnity; but that the form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that, with a possibility of something more.
>
> "It can never, therefore, properly be entered into except for the purpose of security or indemnity; though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it, if entered into in conformity to the principles which underlie it, *and so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance, and engrafts upon that contract a purpose foreign to its nature.*"

May on Insurance, sec. 117.

See, also, *Bevin* v. *Conn. Mut. L. Ins. Co.*, 23 Conn., 244.

If, then, defendant in error had ceased to have any actual interest in the life of her former husband; had no claim upon him, either legal or moral, for support; could be pecuniarily benefitted as far as he was concerned in no other way than by his death; in short, had no rights which could be damnified, no interests against the loss of which she was entitled to secure indemnity, upon what fair principle of law can it be claimed that she was entitled to recover in this case a sum greater than the amount of premiums actually paid by her from the date of the issuing of the policy in question down to the time that she ceased to have an insurable interest in the life of George F. Schaefer?

We know of none.

We respectfully submit that, for the errors which we have assigned, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

GEORGE HOADLY,
EDGAR M. JOHNSON,
Counsel for Plaintiff in Error.

CINCINNATI, March 22d, 1877.

Cincinnati Law Bulletin, Print, 17 West Eighth Street.

# Supreme Court of the United States,

OCTOBER TERM, 1876.

## The Connecticut Mutual Life Ins. Co.

*Plaintiff in Error,*

AGAINST

## Francisca Schaefer,

*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

J. D. BRANNAN,
Counsel.

# Supreme Court of the United States,

OCTOBER TERM, 1876.

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## The Connecticut Mutual Life Ins. Co.

*Plaintiff in Error,*

AGAINST

## Francisca Schaefer,

*Defendant in Error.*

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BRIEF FOR DEFENDANT IN ERROR.

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The cause of action upon which this suit was brought was the breach by the defendant below of a certain contract of life assurance, executed July 25, 1868, whereby the defendant undertook to assure the joint lives of the plaintiff and her husband for the benefit of the survivor.

George F. Schaefer, the plaintiff's husband, died on the 15th day of February, 1871, during the continuance of said contract, and upon refusal of the defendant to pay the amount named in the policy, this suit was brought.

The defendant pleaded the general issue, and upon a trial before the Circuit Court and a jury, a verdict was rendered for the plaintiff.

Although the statement of facts contained in the brief for the plaintiff in error is not strictly accurate with respect to all the details of the evidence as they are presented by the record, I shall not re-state the whole case as it appears in the bill of exceptions, but will simply call attention, when the occasion arises, to such errors as I think occur in said statement.

## I.

The first point argued by counsel for plaintiff in error in their brief arises upon the charge of the Court in regard to a certain written acknowledgment of a credit or forbearance of part of the premium payable on July 25, 1870, signed "Geo. F. & C. Schaefer," and offered in evidence by plaintiff in error (Exhibit H, Record, p. 27).

At the trial the plaintiff below gave in evidence the receipts of the Insurance Company for the payment of premiums (Exhibits C & D, Record pp. 7, 18 & 19). This was sufficient proof of payment, and if the Insurance Company desired to show that the policy had become void by reason of non-payment of the premium, it now lay upon the Company to prove non-payment, and in order to do so, it was necessary to give such evidence as would wholly destroy the legal effect of its receipts. Did the Company do this? No attempt was made to show that the premiums had not been paid except that the Company gave in evidence the three forbearance memoranda or notes, which ever they may be, (Exhibits F G & H, Record pp. 26, 27,) and "offered evidence tending to prove that the forbearance note marked "Exhibit H" had been given after the decree of divorce of said parties, and that the signature thereto was not the signature of George F. Schaefer" (Record p. 8).

Was this sufficient to rebut the presumption of payment arising from the production of the receipts of the Company? I think not. The Company ought further to have proved that it was ignorant at the time it took the note that said note was not signed by George F. Schaefer, and that it would not have taken the note had it known that the signature was not that of Geo. F. Schaefer. *Non constat,* but that the Company knew that this note was not signed by Geo. F. Schaefer and was neverteless willing to take it as sufficient for the purpose for which it was given. There is every probability that this was the case, for this note was made by filling out one of the Company's blank forms, and must have been written out and given at their office when the cash part of the premium was paid, and it is in evidence that the note was signed by Mrs. Schaefer's son, so that the Company's agent saw that the person signing the note was not Geo. F. Schaefer.

If the Insurance Company knew that the note in question was not signed by Geo. F. Schaefer, and was nevertheless willing to accept it, the Company could not afterward say that the premium had not been paid, no default having been made in the performance of any of the obligations imposed by giving said note. I submit, therefore, that the plaintiff in error did not give such evidence as was necessary to destroy the effect of the premium receipts put in evidence by the defendant in error, and that therefore the charge asked by plaintiff in error on this subject (Sixth Record p. 9) was properly refused, because it assumed that the mere fact that this forbearance note was not signed by Geo. F. Schaefer was *alone* sufficient to prove non-payment of the premium.

Again, if these forbearance notes be examined, it will be seen that they are not, as counsel seem to suppose, promissory notes, but are mere acknowledgements of a credit or forbearance of a certain part of the premium. The one in question reads as follows:

> "$54. CINCINNATI, O., July 25, 1870.
>
> I hereby acknowledge *a credit or forbearance* of fifty-four dollars of the premium on my policy No. 86708, issued by the Connecticut Mutual Life Insurance Company, which amount shall *be a lien on said policy at* 6 *per cent. per annum until paid or adjusted by return of surplus premium.*
>
> GEO. F. and C. SCHAEFER."
>
> $54.06
> 6.48
>
> 60.54

This is not a promissory note which can affect only the party signing it. It is not a promise to pay at any given time, and it is not a promise to pay on demand. It is simply an *acknowledgment* that a credit has been granted of part of the premium, which, at the rate of six per cent. interest, is to be a lien on the policy until paid or adjusted by return of surplus premium; that is, this amount, with interest, is to be taken out of the proceeds of the policy upon the death, or it is to be taken out of what are usually called "dividends," but are really return premiums, that is, the excess of the estimated cost of insurance for the year over the actual cost. There is no agreement, there is nothing binding the giver of the note ever to pay the money. It is contemplated that "dividends" will satisfy this deferred part of the premium, or, that if the insured dies before the "dividends" are sufficient to pay it, then the notes are to be taken out of the proceeds. This "forbearance note," then, is nothing more than a mere acknowledgment that the payment of a part of the premium has been deferred indefinitely, or until satisfied in the manner therein pointed out, and not by a payment of money at any time.

Such being the nature and intent of this instrument, I submit that its execution by the authority of either of the persons insured in this policy was sufficient, The policy was issued on the *joint* lives of Schaefer and wife, and does not stipulate that the premium should be paid by either of the insured, much less by both of them, and might be paid by a third person for them. The acknowledgment of the forbearance of part of the premium made by one of the insured, in a joint policy, is certainly good as regards the other insured.

It can not be necessary that both the parties insured in a joint policy must acknowledge such a credit, any more than that they should both pay the cash part of the premium. Unless the other party pays the residue of the premium in cash, the acknowledgment by his co-insured of a credit as to that residue must bind him, for he must either do one thing or the other—pay the residue of the premium or be bound by the acknowledgment of his co-insured.

It is very certain that the Insurance Company itself took this view of these forbearance notes, for it appears that they had already taken, without objection, the second forbearance note, signed by G. F. Shaefer alone (Exhibit G Record, p. 27). If the company was entitled to a forbearance note, signed by both the insured, and was accustomed to require such a note, how did it happen that the second note, signed by G. F. Shaefer alone, was accepted by it as constituting a sufficient acknowledgment of the credit oı forbearance of part of the second premium?

The action of the Company, both in accepting the second note thus signed, and in taking, without objection, the third note signed by a third person, with the name of only one of the insured (C. Schaefer, not being the name of either), shows conclusively, I submit, that the Company did not regard these notes as promises to pay, but merely as acknowledgments that a part of the premium was forborne, and was to be paid in a particular manner, and that such acknowledgment was sufficient, if made by either of the persons insured in a joint policy. Counsel argue that because the note was signed Geo. F. and C. Shaefer, and because neither party was named *C.* Schaefer, therefore, the note was binding on neither. It was certainly binding on Mrs. Schaefer, if she authorized it to be signed, as was shown by the evidence. It was probably by some mistake of Mrs. Schaefer's son, that the initial "C" was written, but however that may be, the fact that this note was not signed with Francisca Schaefer's name, and that the Company, nevertheless, took it, proves that the Company did not regard the signature of both Geo. F. and Francisca Schaefer as necessary to constitute an acknowledgment such as it desired.

Another circumstance which adds to the force of the argument is that the Company used printed forms in the singular number, even in the case of a joint policy. Thus tending to show that it did not require a joint acknowledgment of the forbearance of part of the premium. It should be observed that the policy which constitutes the contract between the parties does not stipulate for a note signed by both the insured, and, in fact, makes no mention of notes of any kind, except at the end where the figures are set out (Record p. 14), and in the assumpsit clause, where it is provided that all notes taken for premiums unpaid at the death shall be deducted from the amount of the policy. (Record p. 12.)

Counsel for plaintiff in error say (page 8 of their brief):

> "The payment which the Company was entitled to receive was not only the part due in cash, but also the obligation or forbearance note of the assured for that portion for which the Company

> gave credit, and it was entitled to have the same so executed as to be *binding* upon both George F. and Francisca Schaefer."

The giving of such a note as counsel claim ought to have been given, was not stipulated for in the policy. The Company might have required payment of the whole premium, but preferred to accept part of the premium only and to forbear the residue, and it could do so in any manner, in which it might choose. It might have taken a promissory note, payable on demand or at a fixed time, or it was at liberty to take a mere acknowledgment of such forbearance, the sum forborne to be a lien on the proceeds of the policy, or to be satisfied by "dividends" thereon, and it could take such acknowledgment from either of the insured or from both or even from a stranger who paid to it the cash part of the premium. The Company being thus unrestricted as to the manner of its dealing with the matter of the premium, and there being no obligation upon the insured to give a promissory note for the deferred premium, the mere fact that one of the insured did not sign this acknowledgment which was given, is not enough, as against the Company's receipt, to show that payment of the premium had not been made.

The Company must go further, and show that it did not know that both the insured had not signed the forbearance note, and also that it required the note to be signed by both when the cash part of the premium was paid, and that it would not have taken this note had it been aware that Geo. F. Schaefer did not sign it.

The purpose of this forbearance note being, so far as appears upon the record, not to constitute a promise of payment of a sum of money, but simply an acknowledgment, which should entitle the Insurance Company to deduct the amount, with interest, from the proceeds of the policy, or from dividends which might accrue thereon, it would seem clear that such an acknowledgment by the survivor must be sufficient, because it would enable the Company to pay itself the unpaid part of the premium out of the proceeds of the policy, and in this case the jury took the amounts of the three notes, and interest, from the amount of the policy and interest. If a promissory note, payable in six months, had been signed by the authority of Mrs. Schaefer alone, and if it had been paid at maturity, the Company could not have set up the defense that the premium had not been paid. In like manner the Company is debarred from making such a defense when a forbearance note, of the kind here given, is signed by the authority of the survivor, because it prevents the survivor, claiming under the policy, from disputing the right of the Company to be allowed the amount of the note and interest as a charge on the proceeds of the policy. Counsel say (p. 10 of their brief):

> " We have shown that Geo. F. Schaefer never authorized any one to sign this paper for him."

And on pages 4 and 7 the same assertion is made. This is an error: there was no proof either way as to this matter. It was merely shown by plaintiff in error that the signature to said note was not that of Geo. F. Schaefer; but whether it was, or was not signed by his authority, does not appear.

There is another question which arises on this branch of the case, viz: whether the payment of the cash part of the premium, and the giving a note for the residue, signed by the authority of Mrs. Schaefer, and so binding on her, did not keep alive the policy upon Geo. F. Schaefer's life, even though the failure of Geo. F. Schaefer to sign the note, avoided the policy so far as it insured the life of Mrs. Schaefer?

This policy is an assurance by Francisca Schaefer on the life of Geo. F. Schaefer, and by Geo. F. Schaefer on the life of Francisca Schaefer. (See policy, pp. 11-14 of record, and applications of Geo. F. Schaefer and of Francisca Schaefer, pp. 21 and 24 of record). Is it not possible that the policy may have become forfeited so far as it insured the life of Francisca Schaefer, and remained in force so far as it insured the life of Geo. F. Schaefer? If the non-signing of the forbearance note by Geo. F. Schaefer amounted to a non-payment by *him* of the premium, is it still not true that the performance by Mrs. Schaefer of everything which she was called upon to do, would keep her policy on her husband's life alive, whatever became of his policy on her life?

But if it be contended that this view of the nature of the policy is incorrect, and that it is a policy which, while insuring two lives for the benefit of the survivor, is so essentially joint in its nature that it can not fail as to one of the lives insured without also becoming void as to the other, then, I submit, that it follows from this very joint nature of the policy, that the acknowledgment by one of the persons insured of the forbearance of part of the premium, is an acknowledgment as to both, and it can no more be contended that both of the insured must sign this acknowledgment, than that all of several partners must sign a forbearance note for premium forborne on a policy of insurance on their partnership property. In this view, the policy is a *quasi* partnership investment. The position taken by counsel for plaintiff in error must, if it have any foundation at all, be based on the idea that, as this policy is a joint policy, therefore everything done in connection with it must be a joint act. On no other theory can their argument stand. But it must follow, then, that breaches of the conditions of the policy must be joint, and that in order to avoid the policy, *both* Geo. F. and Francisca Schaefer must become intemperate, or commit suicide, or have given false answers in the applications for the policy, or violate any other of the agreements in the policy; or to apply the *reductio ad absurdum*, they must have *jointly* failed to pay the premium, or to sign the forbearance note.

The argument *ab inconvenienti* is not to be regarded as having great force when it is opposed to the established rules of law, but when, as in this case, there are no decisions cited by counsel, and where the point is one of first impression, this form of argument is entitled to some weight. Suppose, then, in the case of a policy on the joint lives of husband and wife, one of the parties not caring to continue the payment of premiums, and wishing to allow the policy to lapse, should refuse to sign a forbearance note or to give the other authority so to do, and supposing the policy to be one under which the Company have the right to require a forbearance note to be given for a part of the premium—in such a case, if the Company choose to insist on a note, the policy must be avoided even as to the party desiring to keep it in force, because, unfortunately, a joint policy has been taken out, instead of two separate polices, and because a note signed by one party will not be valid. Or suppose the wife has gone to Europe, and the day for the payment of premium arrives during her absence, here the policy must lapse, unless the husband has had the forethought to get authority from his wife to sign her name to the note.

## II.

The next assignment of error made by counsel for plaintiff in error is upon the refusal of the Court to allow a certain question to be put by counsel for the Insurance Company to one George H. Harris, (record, p. 8).

I shall argue upon all the points made by my learned opponents upon this question, but there is one consideration which I submit is alone sufficient to dispose of the assignment of error, and this is, that plaintiff in error was not, and could not, in any aspect of the case, be prejudiced by the ruling of the Court in refusing to allow the question to be answered. The question was as follows (Record, p. 8):

> "State whether or not the plaintiff did not tell you, when you were preparing her petition for di-

> vorce, George F. Schaefer had *not* been an habitual drunkard for more than three years prior to that date."

Stripping the sentence of the qualifying clauses, so as to get at its meaning as clearly as possible, it amounts to this: "Did not the plaintiff tell you that Geo. F. Schaeffer had *not* been an habitual drunkard?"

This question was clearly inadmissible on every ground. It was leading; it was, "State whether or not the plaintiff did *not* tell you," thus implying an affirmative answer.

Moreover, the information sought by the question was immaterial and irrelevant to the issues in the case, because it would have made no difference whether the plaintiff had or had not told Mr. Harris that her husband had not been an habitual drunkard for three years.

But even if the question were strictly competent, its rejection by the Court would be no ground for reversal of the judgment, unless it appear that the plaintiff in error was prejudiced thereby. It is a well established principle that Courts of error will not reverse judgments because of errors of a lower Court, if such errors did not injure the party complaining of them.

In *Stull* v. *Wilcox*, 2 Ohio St., 569, the Court said: "Judgments are not to be reversed for immaterial errors." In *Scovern* v. *State*, 6 Ohio St., 288, and in *Ohio Life and Trust Co.* v. *Goodin*, 10 Ohio, St., 557, it was held that it must appear not only that there was error, but that the plaintiff in error was prejudiced thereby.

In *Courtright* v. *Staggers*, 15 Ohio St., 510, 514, it was held that to justify the reversal of a judgment, where the error complained of is the rejection of evidence, its materiality must *affirmatively* appear upon the face of the record. See also, *Whitman* v. *Keith*, 18 Ohio St. 134.

The same rule has been laid down in the United States Courts, viz: That error by which plaintiff in error could not have been injured, is no gronnd for reversal. *Gregg* v. *Moss*, 14 Wallace, 564; *Turner* v. *Fendall*, 1 Cranch, 117.

Now, it is clear that the plaintiff in error was not prejudiced by the ruling of the Court in excluding this question, because the answer could not have been material or useful to the cause of the plaintiff in error. If the question had been answered in the negative, viz: that the plaintiff had *not* told Harries that her husband had not been a drunkard, this information would have had no relevancy or bearing whatever on the issues involved. If the answer had been in the affirmative, viz: That the plaintiff *had* told Harris that her husband had not been a drunkard, the case of the plaintiff in error would have been injured rather than benefited by this answer.

The plaintiff in error was, then, not injured by the ruling of the Court, and therefore even though the ruling be erroneous, it is no ground for reversal of the judgment.

It may be said that the Court did not put its ruling on the grounds above set forth as showing the incompetency of the question. This fact can make no difference, because the reasons assigned by a Court for its judgment are immaterial if the judgment is in fact correct. If there be any reason which will support the ruling of the Court, the ruling will be sustained, even though the Court gave other reasons.

> *Palmer* v. *Farrington,* 1 Ohio St., 253.
> *Courtright* v. *Staggers,* 15 Ohio St., 510, 514.
> *Silsby* v. *Foote,* 14 Howard, 219.

Counsel for plaintiff in error have argued upon the second assignment of error, as if the question put to Harris had been the exact opposite of the one actually asked, and on pages 4 and 11 of their brief they state the question thus erroneously. An inspection of the original bill of exceptions shows that the transcript of the record is correct, and that the question as printed is the same as written in the original bill of exceptions.

But for the purpose of answering the arguments of counsel, I will suppose the question to have been the reverse of that which was really put, and that its rejection was prejudicial to the plaintiff in error.

My learned opponents contend that the 315th section of the Code of Civil Procedure had the effect, under the circumstances of this case, of making the attorney of Mrs. Schaefer a competent witness to testify as to communications made to him in his professional capacity; and they cite the case of *King* v. *Barrett,* 11 O. St. 261, to sustain their position. I shall hereafter endeavor to show that an amendment of section 314 of the Code passed subsequently to the decision in *King* v. *Barrett,* has had the effect of repealing section 315; but without reference to this question of repeal, I submit that the facts of this case do not bring it within the ruling in *King* v. *Barrett.* In my humble opinion, either the Court, in the case of *King* v. *Barrett,* overlooked the last clause of section 315 of the Code, which qualifies and limits the foregoing part of the section, or it must have appeared in that case, as a matter of fact, that the client had testified on the "same subject" on which the communication was made to the attorney.

Section 315 reads as follows:

> "If a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney, clergyman or priest *on the same subject within the meaning of the last two subdivisions of the preceding section.*"

The last two sub-divisions of the preceding section, as that section stood when first enacted (3 Curwen Revised Statutes pp. 1986—1987) read as follows:

> 4. "An attorney, concerning any communication made to him in that relation, or his advice thereon, without the client's consent.
>
> 5. "A clergyman or priest, concerning any confession made to him, in his professional capacity, in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession."

Now, if the words in section 315 "on the same subject within the meaning of the last two subdivisions of the preceding section" have any meaning at all, I submit that the intent is that, if the witness has been examined in chief on a subject concerning which it is claimed that he made a communication to his attorney, then the attorney may be examined *on the same subject* with regard to which the witness has given evidence. The only meaning which can be given to the words "on the same subject," must linit the examination of the attorney to the subject or subjects on which his client has testified.

In the case of *King* v. *Barrett* the Court did not pass upon the construction to be given to this last clause of section 315, and their attention does not seem to have been called to the subject. But as it would probably be fruitless to endeavor to persuade this Court to depart from the ruling of the Supreme Court of Ohio, upon a question of practice under the Ohio Code, I will grant that the case of *King* v. *Barrett* was correctly decided. But taking that case in its strongest aspect, does it apply to the case at bar? I submit that it does not, because the bill of exceptions in this case does not show such a state of circumstances as to bring the case within the ruling in *King* v. *Barrett*. It was decided in that case that where the bill of exceptions showed that the person offered himself as a witness and gave evidence *generally*, it was error not to allow his attorney to be examined as to communications made to him respecting all the issues involved in the case.

The syllabus, which in Ohio is a statement by the Court of the law laid down in the case, states the rule thus:

> "But if a party to a suit offers himself as a witness, and *gives evidence generally* in the case, he thereby loses his privilege, and under the Code of Civil Procedure (sec. 315), consents to the exami-

> nation of his attorney, touching such admissions as are pertinent to the issue."

It appeared (p. 262) that

> "After the defendant had closed his testimony, the plaintiff offered himself as a witness *and testified generally* in the case."

The Court also said (p. 264):

> " In the case before us, Barrett, being a party, voluntarily offered himself as a witness *generally* in his own behalf. * * * * Those communications were no longer privileged, and having made himself a witness and given evidence *generally* in the case," &c.

I submit, then, that the bill of exceptions must show either that the party gave evidence on the subject respecting which it is claimed that a communication was made to his attorney, so as to open the way to the examination of the attorney " on the same subject," or at least that the party gave "*evidence generally in the case,*" and that the rule laid down in the case of *King* v. *Barrett* goes no farther than this. But in this case neither state of facts appears. The bill of exceptions does not state that the plaintiff gave evidence generally, and there is no showing that she did so. It appears merely that she " was sworn as a witness in her own behalf,"and upon cross-examination answered certain questions put by defendant's attorney (Record p. 8). It does not appear that she had given any evidence in chief; she might have only been asked her name or some trifling questions, and her counsel may then have decided not to examine her on the issues in the case.

Later in the course of the trial it appears that the plaintiff did testify as to one fact in rebuttal of the testimony of Dr. Bruckner, tending to prove that Schaefer had had a certain attack of delirium tremens *subsequently* to the execution of the policy of insurance.

This, then, was all the testimony given by the plaintiff, and was not upon the subject with regard to which it was claimed she had made a communication to Harris, viz: intemperate habits of her husband *prior* to the application for the policy, and it surely could not be said that she gave evidence *generally* in the case in testifying to one isolated fact in rebuttal of testimony offered by defendant below.

I come now to the consideration of the question whether the 315th section of the Code was in force at the time of the trial of this case before the Circuit Court; and I shall endeavor to show that that section was no longer law in Ohio, but had been impliedly repealed by an amendment of section 314, which, in my judgment, so changed the law with regard to incompetent witnesses, as to withdraw from the operation of section 315 each and every one of the classes formerly affected by it, and to create such an irreconcilable repugnancy between section 314 as now existing and section 315, that the latter must be regarded as repealed, although there has been no act of the Legislature which expressly repeals said section 315.

I am not disposed to dispute the doctrine that repeals by implication are not to be favored, and it would be idle to do so. But the law as defined by the Courts of the State of Ohio, does not differ materially from the general rule upon this question. It cannot be denied that in order to show a repeal by implication there must either be a repugnancy between the provisions of two statutes, or it must appear that the later act was intended to be a complete revision of the subject treated of in the former act. But it is not impossible that there should be a repeal by implication in Ohio, and the following cases are authorities which prove that this question is treated of in the Courts of this State in much the same way as in those of other States, and that repeal by implication is allowed in proper cases.

*Moore* v. *Vance*, 1 Ohio 1.
*Lorain Plank Road* v. *Cotton*, 12 Ohio St., 263.
*Lehman* v. *McBride*, 15 Ohio St., 573, 605.
*Commissioners* v. *McComb*, 19 Ohio St., 320, 345.

A long course of judicial decisions has established the rule that a repeal by implication may occur not only where there exists an irreconcilable repugnancy between the provisions of two statutes, but also in cases where, although the later act is not repugnant in all its provisions to the prior act, yet it is evident that the later statute is intended to be a revision of the law upon the particular subject, and to prescribe the only rule which shall govern.

The rule is laid down in Sedgwick on Statutory and Constitutional Law, 2d edition, p. 104, as follows:

"But on the other hand, it is equally well set-

> tled that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms, and even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act. *Leges posteriores priores contrarias abrogant.* * * * *
> It has been repeatedly declared that every statute is by implication a repeal of all prior statutes, so far as it is contrary and repugnant thereto, and that without any repealing clause:"

There are numerous cases which support the rule as thus stated; but the principle is so familiar that it would seem tedious to quote passages from the opinions of Courts, and I therefore merely cite a number of the leading cases which are directly in point and which establish the rule as stated by Mr. Sedwick:

*United States* v. *Tyner,* 11 Wallace, 88, 92; *Bartlett* v. *King,* 12 Mass. 537; *Wakefield* v. *Phelps,* 37 N. H. 295; *Farr* v. *Brackett,* 30 Vt. 344; *Giddings* v. *Cox,* 31 Vt. 607; *Sacramento* v. *Bird,* 15 Cal. 294; *State* v. *Conkling,* 19 Cal. 501; *Swann* v. *Buck,* 40 Miss. 268; *Stroman* v. *State,* 21 Texas 734; *Johnston's Estate,* 33 Penn. St. 511; *Davies* v. *Fairburn,* 3 Howard 636; *Gorham* v. *Luckett,* 6 B. Monroe 146; *Dean of Ely* v. *Bliss,* 5 Beavan 582, per Lord Langdale; *Commonwealth* v. *Allegheny Co.,* 40 Penn. St. 348.

I maintain both that there is an irreconcilable contradiction between the provisions of section 314 as now existing and of section 315, and also that the study of section 314, as amended in 1870, shows that it was the intention of the Legislature to make an entire and complete revision of the law upon the subject of incompetent witnesses, to change in many respects the policy of the law with regard to some classes of witnesses, and to substitute the new rules for all prior provisions on the subject.

In order that the changes made in section 314 by the amendatory act of 1870 may be the more easily perceived, I have placed side by side the original section, and the section as amended in 1870, indicating by italics the differences between the two sections. And I have placed section 315 at the foot of the parallel columns.

| 3 Curwen's Rev. Statutes, pp. 1986-1987, March 11, 1853. | Ohio Laws, Vol. 67, p. 113. April 18, 1870. |
|---|---|
| Sec. 314.<br>*Who are incompetent to testify.*<br>The following persons shall be incompetent to testify: | Sec. 314. The following persons shall be incompetent to testify: |
| 1. Persons who are of unsound mind at the time of their production for examination. | 1st. Persons who are of unsound mind at the time of their production for examination. |
| 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. | 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts *and transactions* respecting which they are examined, or of relating them thereby. |
| 3. Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterward. | |
| 4. An attorney concerning any communication made to him in that relation, or his advice thereon, without the client's consent. | 3d. An attorney concerning any communication made to him by his client in that relation, or his advice thereon, without the client's *express* consent, *or a physician concerning any communication made to him by his patients in that relation, or his advice thereon, without his patient's consent.* |
| 5. A clergyman or priest, concerning any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs *without the consent of the person making the confession.* | 4th. A clergyman or priest, at any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs. |
| | 5th. No person who would, if a party, be incompetent to testify under the provisions of Section 313, shall become competent by reason of an assignment of his claim. |
| | 6th. Nor shall any person who would be incompetent to testify under the provisions of said Section, in an action between himself and any party named therein, become competent by reason of a sale or transfer of any property by said executor, administrator, guardian, trustee, heir or devisee, concerning which property said action is brought, or in |

I shall speak hereafter of the changes made by this amendatory act in regard to the other classes of persons included in the original act, and the effect thereof, both as indicating the intent of the Legislature as to a revision of the law generally, and as to section 315 in particular; but, for the present, it is, perhaps, more proper to look at the state in which this amendment has left the law with regard to the competency of an attorney.

Although there had been prior changes in section 314, now for the first time the word "*express*" is inserted before the word consent, when speaking of the limitation on the disqualification of an attorney. A change so marked must have been made with purpose, and meaning must be given to this new word. It is not an idle superfluity, but draws a distinction between different kinds of consent. The original act made the attorney incompetent to testify "without the client's consent," and section 315 made the fact of the person giving evidence an implied consent to the examination of his attorney. The giving evidence one's self was not an express consent, but was a consent implied by the law from the act of the client. But the consent now required under the amendment is an "*express*," not an implied consent. It is not enough that the client should do acts from which a consent may be implied; he must expressly waive his privilege. The consent inferred from the act of giving evidence is no more an express consent, than a promise implied by law is an express promise.

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It does not seem to me that counsel for plaintiff in error have given any satisfactory reason for the insertion of this word "*express*," if it was not intended to change the rule imposed by section 315. The simple word "consent," in the original act, was sufficient to prevent the attorney testifying against the client's will in all cases, except that provided for by section 315. The law, as it then stood, provided for an implied consent in but one case, and the word "consent" in section 314 was as strong as "express consent" could be, as against every case, except this one. Now the Legislature make a change and say that nothing but an "*express*" consent shall make an attorney competent to disclose communications, and this new provision must either be aimed at section 315, or must be an idle and senseless act.

I submit that upon the single ground of the insertion of the word "express" in the amendment of 1870, there is an irreconcilable repugnancy between section 314 as now in force and section 315, and that the two sections cannot now stand together, and that, therefore, the later act must prevail, and section 315 be regarded as repealed.

But an examination of the whole of section 314, as amended in 1870, and a comparison of it with the original act (*Supra p.* 23) shows still more clearly that the Legislature designed this new act to be a complete revision of the law on the subject of the competency of witnesses, that it intended a radical change of policy, and also that it was the undoubted intention to repeal section 315.

The changes made are numerous. 1. The consent of the client to the examination of the attorney must be *express*.

2. For the first time communications to a physician are privileged. 3. A clergyman or priest is made absolutely incompetent to testify as to communications, made in the course of discipline enjoined by the Church, the limitation as to the consent of the person making the confession being stricken out of the statute. 4. The rule as to communications by husband and wife is also limited. 5. Several additions to the list of incompetent witnesses.

That these changes indicate a change of policy is evident. Formerly communications to attorneys and to clergymen or priests were put upon the same footing. Now the rule of exclusion is made absolutely rigid as to clergymen and priests, and is made stricter as to attorneys.

Doubtless the Legislature now adopted the view that communications made to a clergyman or priest in the course of discipline enjoined by the Church, ought to be absolutely protected, because being so enjoined, they are in a measure involuntary and compulsory upon the conscience of the person making them. They are also to be regarded as being made not to man, but to God himself (1 Greenleaf on Evidence, sec. 247).

That the omission of the words, "without the consent of the person making the confession," renders clergymen and priests absolutely incompetent to testify as to such communications is clear, because this act throughout *disqualifies* the classes of persons therein mentioned, except where a limitation, such as that of allowing the person to testify upon consent of the party interested, is expressly imposed. The disqualification upon the first and second classes is one which cannot be removed by consent of parties because the policy of the law is against their admission to testify.

The fifth and sixth subdivisions are merely intended to provide against evasion of the provisions of another section, viz: section 313.

The class named in the seventh section are also so incompetent that no consent can enable them to testify, it being against the policy of the law for the husband or wife to testify for or against each other, or to endanger the sanctity of the marriage relation by disclosing communications to each other not made in the known presence of a third person.

Another marked change of policy is seen in the protection of communications made to a physician. And here I would call attention to the fact that the Legislature did not require that the consent of the patient to the disclosing of such communications should be *express*, thus drawing a distinction between the case of an attorney and of a physician, undoubtedly for the reason that, as the rule with regard to the privileged nature of communications to attorneys, was an old well established rule of law, these communications ought to be placed on a different footing from those made to a physician, the protection of which was an innovation on the common law rule, and now for the first time granted.

It is thus apparent from the number and nature of the changes made by this new section 314, that the Legislature intended to revise the whole law on the subject of incompetent witnesses, and to make a change in the policy of the law. And it was a part of their design that section 315 should be repealed. I believe that they intended to repeal section 315 expressly, but forgot it. The intention to repeal that section seems very apparent. In the first place, if the Legislature had intended section 315 to remain in force, while introducing, for the first time, an innovation on the common law as to communications to a physician, they would certainly have enlarged section 315 by adding physicians to the class of confidential advisers who might be called if the person seeking the advice had himself testified. There could be no possible reason for exempting a physician from the provisions of that section if it was to be allowed to stand, and there was much less reason for such an exemption than in the case of an attorney, because, as I have said before, communications to an attorney had always been protected, while at the common law a physician or his patient enjoyed no such privilege. The reason why section 315 was not expressly repealed, is probably to be found in the fact that the Legislature were naturally less careful than they would otherwise have been, because there was in fact no necessity for an express repeal of it, the amendment of section 314 being of such a character as to withdraw from the operation of section 315 all of the classes formerly covered by it.

It was not necessary to repeal section 315 so far as concerned attorneys, because section 314 now forbade an attorney to divulge his client's communications without the *express* consent of the client. It was not necessary to repeal section 315 so far as concerned clergymen or priests, because section 314 now made such persons incompetent to testify as to such communications, without exception, the words "without the consent of the person making the confession," which were found in the original act, being now omitted.

The only class which now remains and from whose lips the seal of secrecy might be removed by a consent implied from the fact of the person who made the communication testifying himself, is that of physicians. But as to this class, also, it was not necessary to repeal section 315, because the word "physician" was not in that section.

Under these circumstances, it is not surprising that the Legislature were the more careless and neglected to repeal section 315, expressly, and the fact that there was no express repeal can hardly be used as an argument against a repeal by implication.

There is one other circumstance which not only tends to show the intention of the Legislature to repeal section 315, but also causes section 315 to become wholly senseless and devoid of all meaning, and this is, that in the amendment of section 314, of 1870, the Legislature added a certain number of new subdivisions so that "the last two subdivisions" of that section have no reference to the matter of communications to an attorney or to a clergyman or priest, but relate to wholly different subjects (Supra p. 23,) and there is, therefore, nothing to which section 315 can now refer.

The words of the last clause of section 315 are "on the same subject within the meaning of *the last two subdi-*

*visions of the preceding section.*" If this section be read in connection with the preceding section as now existing, it is impossible to attach any meaning to it. It is utterly senseless, and there is nothing upon which it can operate. Does this not show a clear case of repugnancy between these two sections, such as cannot be reconciled? If the Legislature had intended that section 315 should remain in force, they would surely not have done such a ridiculous thing as to so alter the arrangement of section 314 that no meaning could be given to section 315.

It is argued by my learned opponents that it is allowable to make a search for subdivisions of section 314 which do refer to attorneys and to clergymen or priests, and having found them to cause section 315 to refer to them. This position, if granted, can only effect the question of repugnancy, but leaves untouched the argument as to the great probability that the Legislature intended the amendment of section 314 to be a repeal of section 315.

But I cannot see how it can for a moment be maintained that section 315 may, contrary to its express language, leap over the three final subdivisions of section 314 and attach itself to the two next preceding. The argument of counsel implies not only that section 315 is still in force, but also that it has been *impliedly amended* so as to read "within the meaning of the *second* two subdivisions of the preceding section." Between the question of the implied repeal and the implied amendment of section 315 there can be little hesitation, because, as I have shown, there is every reason for regarding section 315 as repealed, while there is no reason why it should be regarded as amended by implication except the desire of counsel that it should be kept in force.

But suppose we take it for granted that section 315 may, without violence of construction, be considered as referring to the third and fourth subdivisions of section 314 as amended, and what do we find? Aside from the question of the *express* consent required in the case of attorneys, we find in the third division a new clause relating to physicians, a reference to which is absurd (section 315 saying nothing about physicians), but which must still be considered as referred to, and we must find some meaning or other for this reference, in order that section 315 may not be sacrificed. Referring, also, to the fourth subdivision of section 314, we find that the "consent of the person making the confession" is no longer to be found in that subdivision, and that the clergyman or priest is, therefore, "incompetent to testify," and section 315 cannot, therefore, operate on this subdivision.

The truth is that everthing shows that section 315 has been repealed by implication, and an attempt to make section 314 stand together with the amendment of section 315 involves us in many absurdities. The only rational solution of the numerous contradictions between these two sections is to let section 315 go by the board as the Legislature of Ohio evidently intended it should.

## III.

The third and last assignment of error is to the charge of the Circuit Court, to the effect that the right of the plaintiff to recover on the policy was not affected by the fact that she had been divorced from her husband prior to his death, and to the refusal of the Court to give certain charges of a contrary intent presented by counsel for the Insurance Company.

The first question which requires consideration here is, *whether a contract of life insurance is a contract of indemnity;* and, upon this question, I submit that both the nature of the contract itself, and the great weight of authority, answer the question in the negative. It is, of course, competent for an insurer to stipulate that the contract shall be binding only to the extent necessary to indemnify the beneficiary for the actual loss suffered by the death of the assured; but the ordinary contract of life insurance contains no such provision, nor does the contract in this case. A contract of life insurance purports to be nothing more than a promise on the one side to pay a certain sum of money to the assured, or his representatives, or to some beneficiary, designated in the policy, upon the death of the assured, provided the assured, or some one for him, shall at stated periods pay to the promiser a certain fixed sum of money, and provided that the assured shall observe certain conditions contained in the contract, as to habits, residence, &c. It is an absolute promise to pay the sum fixed, without reservation or condition, as above stated. There is no stipulation on the part of any one that the person effecting the insurance has an interest in the life of the assured, or that he will be damnified by the death of the assured, and there is no reservation by the insurer that the money shall not be paid unless the beneficiary, under the contract, can prove an actual loss to himself from the death of the assured. There is nothing, therefore, in the contract itself to show that such a contract is one of indemnity, and it is evident that the parties to such a contract do not so regard it. Is there, then, anything outside of the contract which changes its nature? The law certainly does not cause any such result, because the law does not undertake to make contracts for parties, or to change the terms agreed to by them; on the contrary, *modus et conventio vincunt legem.*

A Court which holds such a contract to be one of indemnity, imports into the contract stipulations which the parties have not made, and makes for them an agreement other than that by which they intended to be bound. It will be found that Courts which have done this have, in nearly every case, been misled by a mistaken analogy between contracts of fire and marine insurance and those of life insurance. But the vital difference between the two kinds of contracts is evident. Fire and marine insurance contracts purport to be contracts of indemnity solely; they usually contain provisions that the contract shall cease with the termination of the interest in the property; they assure against the loss of that which may or may not be destroyed; they are for a fixed, definite time. But life insurance contracts contain no such stipulation with regard to cessation of interest in the life insured; they are made upon a subject which must cease to exist within the contemplated duration of the policy, and they are almost always for a continuous and indefinite period of time.

If life insurance is a contract of indemnity, there can be no contract of life insurance unless a loss would ensue to the person making the contract, upon the death of the insured; yet Courts hold, without question, that a man may make a contract of insurance upon his own life, and how can it be said that a man can be indemnified for the loss of his own life? It seems strange that it has never occurred to those Courts which hold that life insurance is a contract of indemnity, to doubt that a man can insure his own life, even though the beneficiary in the policy be a person who has no interest in the life insured.

*Campbell* v. *Insurance Co.* 98 Mass. 381.
*Provident Life Ins. Co.* v. *Baum* 29 Ind. 236.

Is there not a contradiction in saying that a man may insure his own life, for the loss of which *he* can never be indemnified, and may make the money payable to a third person who has no interest in the life insured, and yet that such third person cannot himself insure the same life for his own benefit, because life insurance is merely a contract of indemnity?

As to the authorities:

The construction to be put upon the contract of life insurance is no longer a subject of doubt in England. The cases of *Dalby* v. *India & London Life Assurance Company*, 15 C. B. 365 and *Law* v. *London Indisputa-*

*ble Life Policy Company*, 1 Kay & Johns 223 have settled the question for that country. The first case in England in which the question of the nature of the contract of life insurance was passed upon, was that of *Godsall* v. *Boldero* 9 East 72, where it was held that such a contract was one of indemnity; but the Court based its judgment upon the decision of Lord Mansfield in *Hamilton* v. *Mendes* 2 Burr 1210, which was a case of marine insurance. But in *Dalby* v. *India & London Life Assurance Co.*, Baron Parke declared that *Godsall* v. *Boldero* was wrongly decided, and that "this species of insurance in no way resembles a contract of indemnity." 15 C. B. 390. Again, page 391, he said: "Lord Mansfield was speaking of a policy against marine risks which is, in its terms, a contract for indemnity only. *But that is not of the nature of what is termed an assurance for life: it really is what it is on the face of it—a contract to pay a certain sum in the event of death.*" The principle thus established was afterward approved in the Chancery Court in the case of *Law* v. *London Indisputable Life Policy Co.* 1 Kay & Johns. 223: S. C. 1 Jurist N. S. 178.

In the United States there is some conflict of authority upon this question, but the great majority of Courts have declared against the view that life insurance is a contract of indemnity. The following are cases where it was directly stated by the Court, sometimes as the ground of decision of the case, sometimes as a dictum merely, that such a contract was not one of indemnity.

*Rawls* v. *Ins. Co.* 27 N. Y. 282.
*Mowry* v. *Ins. Co.* 9 R. I. 346.
*Trenton Ins. Co.* v. *Johnson* 4 Zabriskie 576.
*Robert* v. *N. E. Ins. Co.* 2 Disney 106.
*Ins. Co.* v. *Bailey* 13 Wallace 616.
*McKenty* v. *Ins. Co.* Circ. Ct. U. S. Minn. per Nelson J.: 4 Bigelow's Life & Acc. Ins. Rep. 153.

In *St. John* v. *Ins. Co.* 13 N. Y. 31, it was held that the assignee of a life policy need not prove an insurable interest in the life of the assured, if the policy was valid in its inception, and that the amount of consideration paid by the assignee was immaterial: See also *Valton* v. *Assurance Society*, 22 Barb. 9, and 20 N. Y. 32, where it was held that it was no defense that the assignee of the policy had no interest in the life assured. The two last named cases, as well as all other cases which hold that if a man insure his own life and assign the policy to a stranger, without consideration, the assignee may recover on the policy, must necessarily take it for granted that life insurance is not a contract of indemnity, because the assignee in such a case, having no interest, either pecuniary or otherwise, in the life insured, cannot be damnified by its termination. The same principle must underlie the decisions in the cases of *Campbell* v. *Ins. Co.* 98 Mass. 381 and *Provident Life Ins. Co.* v. *Baum* 29 Ind., 236, which are to the effect that a man may insure his own life for the benefit of a stranger, and that such stranger may recover on the policy without proof of interest in the life insured.

In the case of the *New York Life Insurance Co.* v. *Statham et al.*, decided at this term, this Court made a statement with regard to the nature of the contract of life insurance which seems to me to be utterly opposed to the idea that such a contract can be one of indemnity. Mr. Justice Bradley said:

> "There is no proper relation between the annual premiums and the risk of assurance for the year in which it is paid. * * * *The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured,* a reasonable percentage being added to the premium to cover expenses and contingencies: *the whole premiums are balanced against the whole insurance.*"

This makes life insurance an investment; the whole insurance is not regarded as an indemnity for loss to be suffered, but as an exact equivalent for the "annuity" paid by the insured, or the beneficiary in the policy. The contract is made upon the calculation that according to the average rates of mortality, the insured will live long enough for the sum paid in premiums to equal the sum which the insurer agrees to pay at the death, with something over for expenses and contingencies, and the present value of the premiums corresponding with the present value of the sum to be paid, the bargain is a fair and just one. If the only question arising upon the third assignment of error were the one just discussed, I might end here with most confident assurance that the Court would hold that both the nature of the contract and the great weight of authority are opposed to the doctrine that life insurance is a contract of indemnity.

But this branch of the case gives rise to another question, which, although entirely distinct from the one just treated of, is often confused with it. The question is, "*Is there any rule of law, in the absence of statute, which forbids a man to insure a life in the continuance of which he has no interest—and if so, does this rule operate so as to avoid a policy of insurance upon the termination during the life of the insured, of an interest which existed at the time of the making of the contract?*"

There is little doubt that in England wagering policies were valid at Common Law, and that the Statute 14, Geo. III. c. 48, was not a declaratory Act, but was passed in order to prevent the evils arising from such contracts,

> *Ins. Co.* v. *Magee*, Cook & Al. (Irish Exc. Ch.) 182.
>
> *Trenton Ins. Co.* v. *Johnson*, 4 Zabriskie, 576.

and if the plaintiff had had no interest in the life of the insured, in this case I might contend that as the contract was made in the state of Ohio, and as there is no Statute in that state prohibiting wagering policies, the absence of interest in the life insured would not avoid the contract; but inasmuch as the plaintiff was the wife of the insured at the time the contract was made, it may be conceded, for the purposes of this case, that it is, by the Common Law of this country, illegal for a man to insure a life in the continuance of which he is not interested, and that a policy issued upon such a contract would be void.

The rule against wagering policies is, however, not founded upon the idea that a contract of life insurance is one of indemnity, but is purely a rule of public policy and if the requirements of that rule have been satisfied when the contract was made, the parties have entered into a valid contract, which contains no stipulations as to interest in the life insured, and makes no reservation against liability if that interest should cease before the death of the person insured.

A life insurance policy is over and above everything else, a *contract,* and if the promiser has once become obligated, if the *vinculum juris* has bound him, nothing can release the liability except the failure to perform some of the conditions undertaken on the other part.

If the rule of public policy which prohibits wagering contracts has been violated, there is, in law, no contract between the parties; but if the rule has been observed, a contract arises which must be construed and enforced like every other contract, in accordance with its terms. Having once made himself legally *obligatus,* the promiser must perform according to his agreement.

To illustrate the argument by a figure of speech. The rule of public policy may be likened to an iron gate which falls from above and separates parties who are endeavoring to enter into an illegal contract; but if the parties are so situated that their proposed contract is not illegal, they become united by the *vinculum obligationis,* and if an attempt should now be made to separate them by letting the gate fall between them, its progress would be arrested by the chain which binds them together. The contract, legal when made, unites the parties, and no subsequent matter can divide them.

The proposition that a contract of life insurance may be avoided by the cessation of interest in the life insured, after the contract had been entered into, would, if allowed, involve us in many absurd difficulties. If an interest in the life insured must exist at the death, every contract of life insurance is reduced to an uncertainty. The interest might terminate several times, and be renewed again before the death, and it would follow that the contract would be avoided and again made valid, according as the interest ceased or was renewed, and we should have a contract which is now a contract and now not a contract.

Again, if an interest is necessary at the death, the insurer ought always to be allowed to prove that at the death the plaintiff had no interest in the life assured. But the older the assured became, the less the interest in his life would grow until, if he lived to be a very old man, the interest might be wholly ended, so that his death would be a benefit rather than a loss to the beneficiary in the policy.

Suppose the husband lived to be very old, and had become feeble and infirm and unable to support his wife, and that she was obliged to support him. Here the interest in the life would be reduced to zero. Or suppose, in the case last put, that after the contract had been made some one had granted an estate which was to vest in the wife upon the death of her husband. Here the death would be a benefit and not a loss to the wife. If it be answered that the interest required in such a case is not the expectation of support and pecuniary aid, but is merely the interest of affection, then I answer that if in addition to the circumstances supposed, viz: old age, infirmity, incapacity to work and extreme poverty, which destroyed all expectation of pecuniary help from her husband, the husband should conduct himself so brutally towards his wife that she in fact ceased to feel any affection for him, and really desired his death, would not the insurer, on the theory advanced by counsel for plaintiff in error, be entitled to prove these facts in avoidance of the contract?

The doctrine that an interest must exist at the death of the assured would thus enable an insurer to raise the question whether the promisee under the contract had a pecuniary interest at the death, and also, to proceed to an analysis of the feelings of the promisee towards the assured in order to show that the interest arising from affection no longer existed.

The argument for plaintiff in error, pushed to its logical conclusion, would avoid every contract, if at any time during its continuance such a state of circumstances should arise as, if they had existed at the inception of the contract, would have rendered the contract illegal. In some of the States a contract of loan upon interest in excess of the legal rate makes such a contract wholly void. Suppose that in such a State the legal rate is ten per cent., and a loan is made at that rate, and that afterwards, before the loan is due, an act of the Legislature changes the law and makes eight per cent. the legal rate. All existing contracts of loan reserving interest at a greater rate than eight per cent. must now become void, because the contract would have been illegal and void, if the circumstances had been the same when it was made. The same argument applied to the case of a loan made at a legal rate of interest would avoid it if usurious interest were afterwards received, contrary to the well established principle that a contract not usurious in its inception does not become so by the subsequent receipt of usurious interest.

*Nichols* v. *Fearson*, 7 Peters 103.
*Busby* v. *Finn*, 1 Ohio St., 409.

The number of ridiculous consequences of the theory that a cessation of the interest in the life assured avoids a policy of life insurance might be indefinitely multiplied. See the Essay on Probabilities, by Prof. De Morgan, p. 244 (cited 80 Eng. Com. Law Rep. p. 393, in note to *Dalby* v. *Life Assurance Co.*)

Before proceeding to the citation of authorities upon this subject, I would say that it does not seem to me so entirely certain as counsel for plaintiff in error assume, that the plaintiff had not a sufficient interest in the life of Geo. F. Schaefer at his death to support the policy. The nature and *quantum* of interest required to maintain a policy on the life of one person in favor of another are things which can hardly be said to be very definitely fixed.

The cases show that a pecuniary interest is not required and the sum of the conclusions to be deduced from the cases is that any expectation of benefit of any sort tangible or intangible, material or spiritual, is sufficient. In fact the doctrine of insurable interest in life insurance is fast becoming as artificial as the common law doctrine of consideration for a contract, and I apprehend that the time will come when it will be held that a life policy is not a wager, whenever the person effecting the insurance and the insured stand in such relation to each other that the former might reasonably and naturally be expected to desire the continuance in life of the latter, and it will be a question for the jury in each case, whether the contract is a mere betting upon the chances of life. See *Forbes* v. *American Mut. Life Ins. Co.*, 15 Gray, 249, 254.

Although the plaintiff in this case had married again before the trial of this action, she was still unmarried at the time of Schaefer's death, at which time her right to recover on the policy must have arisen. Her marriage subsequently to the accrual of her cause of action cannot effect her rights. Now, although the plaintiff had been divorced from her husband, it by no means follows that it would be unreasonable to expect that she might derive advantage from his longer continuance in life. Although he may have so conducted himself towards his wife as to constrain her to procure a divorce, he may still have felt affection for her, and it not unfrequently happens that divorced people have come together again. After a man and woman have lived together for years in the marital relation, is it unreasonable to say that, although they have been divorced for some cause, after time has allayed the heat of resentment, the old affection may revive and that they may desire to resume their former relation toward each other? It is also far from improbable that, should the woman become unfortunate and fall into want, her former husband would offer pecuniary assistance. All these are chances of which there is, I submit, a reasonable expectation. There was, I think, still existing in this case, at the death, an expectation no less probable than that which has sometimes been held by Courts sufficient to constitute an interest in the life insured. *Miller* v. *Ins. Co.*, 2 E. D. Smith 268; *Chrisholm* v. *Ins. Co.*, 52 Mo. 213.

The view which I have endeavored to maintain, viz., that an interest existing at the inception of the contract need not continue until the death of the insured, has met with the approval of nearly every Court, both in England and in this country, which has had occasion to pass upon the question, either directly or indirectly. The case of *Dalby* v. *India & London Life Ass. Co.*, 15 C. B. 365, already referred to, was a case where the Anchor Life Assurance Company had granted four policies to the Rev. John Wright on the life of the Duke of Cambridge to the amount of £3,000, and then, to secure itself against loss, effected the policy declared on with the defendants by way of counter-assurance, on the life of the Duke of Cambridge. The policies held by Wright were surrendered to the plaintiff before the death of the Duke of Cambridge, and the interest of the plaintiff in his life had terminated. The defendants claimed that the policy was avoided by this cessation of interest in the life insured. The question was thus squarely presented, and the Exchequer Chamber unanimously held the policy valid, on the ground that if the contract is not a wager at the time it is made, it cannot become so by the subsequent cessation of interest in the life insured.

The explanation of this case attempted by my learned opponents (p. 36 of their brief,) is not very satisfactory.

It is true, the case was decided under the statute 14 Geo. III c. 48, but that statute has had the effect of establishing in England the same rule with regard to wagering policies which exists in this country as a part of its common law. The first section of the statute recites that "*it had been found by experience that the making insurance on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming,*" and enacts:

> "That from and after the passage of this act no insurance shall be made by any person or persons or on any event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account, such policy or policies shall be made, shall have no interest, *or by way of gaming or wagering;* and that every assurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever."

Section 3d enacts:

> " That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the

> interest of the insured in such life or lives, or other event or events."

This statute, then, was passed for the very purpose of preventing wagering or gaming policies, and the rule established by it is certainly as strict as that rather indefinite rule of public policy which prevails in this country, and I apprehend that if our rule of public policy were formulated and made the subject of statutory enactment, it would have to be stated in nearly the same words as those contained in the Act of 14 George III, c. 48.

The case of *Law* v. *London Indisputable Life Policy Co.*, 1 Kay & Johns, 223, was another case where the interest in the life insured had wholly ceased. Vice Chancellor Wood said (p. 228):

> "Policies of insurance against fire and marine risks are contracts to *recoupe* the loss which parties may sustain from particular cases. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that in consideration of a certain annual payment, the Company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment. Whatever event may happen meanwhile, is a matter of indifference to the Company. They do not found their calculations upon that, but simply upon the probabilities of human life, and they get paid the full value of that calculation. On what principle can it be said that if some one else satisfies the risk on

> account of which the policy may have been effected, the company should be released from their contract?"

The contract was, therefore, enforced.

The following authorities in this country adopt the principle that a contract of life insurance, valid in its inception, is not avoided by the cessation of interest in the life insured:

Bliss on Life Insurance, sec. 30, & note 2; *Mowry* v. *Ins. Co.*, 9 R. I., 346; *Ins. Co.* v. *Bailey*, 13 Wall., 616, 619; *Valton* v. *Assur. Society*, 22 Barb., 9, 35-36, S. C. affirmed, 20 N. Y., 32; *Rawls* v. *Ins. Co.*, 27 N. Y., 282, 289; *McKee* v. *Ins. Co.*, 28 Mo., 383; *Trenton Fire and Life Ins. Co.* v. *Johnson*, 4 Zab., 576.

In each of the above cases the Court laid down the doctrine for which I have contended, although it is true that in most of the cases the Court found that there was in fact an insurable interest still existing at the death.

In *St. John* v. *Ins. Co.*, 13 N. Y., 31, 40, it was held that the assignee of a policy taken out by the assignor on his own life, could recover without proving an interest in the life of the assignor, and without reference to the amount of consideration paid for the assignment. The doctrine that the interest need not be continuous, must be assumed in order to support this decision, for after the assignment the assignor had no interest, and if the assignee paid nothing for the assignment he had no insurable interest. The assignee, under such circumstances, was in the position of a man who held a policy on a life in the continuance of which he was not interested, and the circumstances having become such that if they had been the same when the policy was taken out it would have been void, the contract ought, according to the theory of my opponents, to have been avoided. But the Court held otherwise.

The cases of *Campbell* v. *Ins. Co.*, 98 Mass., 381, and *Provident Life Ins. Co.* v. *Baum*, 29 Ind., 236, seem to me to require the same assumption to support them, for in those cases it was held that if a man effected assurance on his own life, the beneficiary in the policy might be a stranger, who had no interest whatever in the life assured.

The only cases cited to support the doctrine maintained by counsel for plaintiff in error are the cases of *Stevens, admr.*, v. *Warren, admr.*, 101 Mass., 564, and *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind., 117. But the case in Massachusetts does not sustain the position taken by my learned opponents. That case decided simply that the assignee of a policy could not recover where the policy contained a stipulation that it should not be assigned without the consent of the insurance company, and its consent to the assignment had not been obtained. The case of *Franklin Life Ins. Co.* v. *Hazzard*, 41 Ind., 117, is a very ill-considered case, and is disapproved by the learned editor of Bigelow's Life Insurance Reports, vol. 3, p. 564 note. The decision of the Court professes to be based upon the case of *Stevens* v. *Warren*, 101 Mass., 564, but the essential difference between the two cases is, that in the Massachusetts case the condition in the policy requiring the consent of the company to its assignment had not been complied with, while in the Indiana case the Insurance Company had assented to the assignment.

Not only, therefore, is this Indiana case opposed by the cases of *St. John* v. *Ins. Co.* 13 N. Y. 31, and *Valton* v. *Assurance Society*, 22 Barb. 9, and 20 N. Y. 32, but the facts distinguish it from the only case which it professes to follow; and it is moreover in conflict wtih the principle involved in the case of *Provident Life Ins. Co.* v. *Baum* 29 Ind. 236, decided by the same Court.

As for the passage cited from Mr. May's work on Insurance, I would say that, even in the very section quoted from, Mr. May declares himself in favor of the doctrine that the insurable interest need not continue until the death of the assured. With regard to Mr. May's view of the natureof the contract of life insurance, little need be [redacted]e said, for he arrives, after much discussion, at the rather comical conclusion that life insurance is a contract of indemnity, and yet is *not* a contract of indemnity.

It seems, then, that, although there are few cases where it was necessary that the question here involved should be directly decided, yet there has been so great unanimity in the expression of opinion by Courts, that it may fairly be said to be the law of this country, that a contract of life insurance, valid in its inception, is not avoided by the subsequent cessation of interest in the life insured.

I respectfully submit that the record shows no error in the ruling and charge of the Circuit Court, and that the judgment ought therefore to be affirmed.

J. D. BRANNAN.  
Counsel for Defendant in Error.

*Cincinnati April*, 1877.